UNITED STATES GOVERNMENT

National Labor Relations Board

Memorandum

TO: Chairman Kaplan
Member Pearce
Member McFerran

FROM: Lori Ketcham
Associate General Counsel, Ethics
Designated Agency Ethics Official

Jamal M. Allen
Special Ethics Counsel
Alternate Designated Agency Ethics Official

SUBJECT: Recommended Action Plan Respecting the Board's Adjudication of Hy-Brand Industrial Contractors, Ltd., 365 NLRB No. 156 (2017)

DATE: February 21, 2018

Overview

This memo is in response to the Inspector General's (IG) recommendation for corrective action with respect to the issues raised in the IG Report dated February 9, 2018 regarding alleged deficiencies in the Board's administration of its deliberative process in a particular matter.[1] The IG found that, due to the manner in which the Board majority adjudicated Hy-Brand Industrial Contractors, Ltd., 365 NLRB No. 156 (2017), it had effectively become the same "particular matter involving specific parties" as Browning-Ferris Industries of California, Inc. d/b/a BFI Newby Island Recyclery, 362 NLRB No. 186 (2015). Based on the totality of the specific facts described in his report, the IG determined that Member Emanuel violated Par. 6 of the Trump Ethics Pledge (Ethics Pledge) which prohibits him from participating in any "particular matter involving specific parties that is directly and substantially related to my former employer or former clients," because his former law firm, Littler Mendelson, P.C., represents a party in Browning-Ferris. Thus, the IG concluded that Member Emanuel "should have been recused

[1] The subject line of the IG Report is as follows: "Notification of a Serious and Flagrant Problem and/or Deficiency in the Board's Administration of its Deliberative Process and the National Labor Relations Act with Respect to the Deliberation of a Particular Matter." On February 15, 2018, the Board forwarded a copy of the IG Report to Congress with a cover letter stating that it is "evaluating the Inspector General's findings, considering appropriate actions related to Hy-Brand Industrial Contractors, Ltd., 365 NLRB No. 156 (2017), and reviewing current procedures for highlighting and addressing recusal issues with the assistance of the Board's Designated Agency Ethics Official."

from participation in deliberations leading to the decision to overturn *Browning-Ferris*." (IG at 4).

To address this problem, the IG recommended the following corrective action:

> Member Emanuel's participation in the *Hy-Brand* decision, when he otherwise should have been recused as outlined above, calls into question the validity of that decision and the confidence that the Board is performing its statutory duties. I recommend that the Board consult with the Designated Agency Ethics Official to determine the appropriate action to take to resolve that issue and restore confidence in the Board's deliberative process; and
>
> Member Emanuel's participation in the *Hy-Brand* decision demonstrates that the Board's current practice of highlighting and addressing recusal issues should be reviewed to determine if it is adequate to protect the Board's deliberative process from actual conflicts of interest and the appearance of such. I recommend that the Board consult with the Designated Agency Ethics Official to conduct that review and resolve any issues. (IG at 5).

We agree with the IG's determination that, under the totality of the circumstances, Member Emanuel violated the Ethics Pledge. (b)(5) [redacted]

(b)(5) [redacted]

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Facts

Procedural History of Browning Ferris

The case originated with the Board's processing of a representation petition filed in Region 32 by the Sanitary Truck Drivers and Helpers Local 350, International Brotherhood of Teamsters (the Union) seeking to represent a unit of approximately 120 workers at a recycling facility operated by Browning-Ferris Industries of California (BFI).[4] The petitioned-for employees were provided by Leadpoint Business Services (Leadpoint), a supplier employer, to BFI, the user employer. The Union alleged that BFI and Leadpoint were joint employers for the petitioned-for employees. Both Leadpoint and BFI argued that Leadpoint was the sole employer. Relevant here, Leadpoint was represented by Littler Mendelson, Member Emanuel's former firm.

(b)(5)

[4] Case No. 32-RC-109684 was filed on July 22, 2013.

The Region issued a Decision and Direction of Election (DDE) on August 16, 2013 finding that "Leadpoint [is] the sole employer of the employees in question at BFI's Facility and that [the Union's] arguments for joint employer status between BFI and Leadpoint are unconvincing." Id. at pg. 19. Subsequently, on September 3, 2013, the Union filed a Request for Review of the DDE alleging that the Region misapplied the existing Board precedent, and in the alternative, that the Board should reconsider the standard for determining joint employer status. Littler, on behalf of Leadpoint, filed an Opposition to the Request for Review on September 10, 2013 stating that the DDE correctly concluded that Leadpoint was the sole employer. On April 30, 2014, the Board granted the Union's Request for Review.[5] Thereafter, on May 12, 2014, the Board issued a Notice and Invitation to File Briefs soliciting comments from the parties, and interested amici, respecting the following: (1) "whether under the Board's current joint-employer standard" Leadpoint was the "sole employer of the petitioned-for employees" in the unit; (2) whether the "Board [should] adhere to its existing joint-employer standard or adopt a new standard" and; (3) "if the Board adopts a new standard for determining joint-employer status, what should that standard be."

Numerous parties filed amici briefs in response to the Board's invitation. Littler filed briefs on June 26 and July 10, 2014 arguing that Leadpoint alone was the employer of the employees and that the Board did not need to revisit its formula for determining joint employer status. The Board issued its Decision and Order in Browning-Ferris on August 27, 2015, in which it held that Leadpoint and BFI were joint employers under the Act. In reaching this decision, the Board majority in Browning-Ferris adopted a new joint employer standard that no longer required a showing that a putative joint employer actually exercised direct and immediate control over workers' terms and conditions of employment, but that the mere existence of reserved joint control would suffice. Then-Member Miscimarra and then-Member Johnson authored a 29-page dissent to the majority opinion. Consistent with the position advocated in the briefs filed by Littler, the Browning-Ferris dissent argued that BFI and Leadpoint are not joint employers and that the Board should not have altered its joint employer standard. (b)(5)
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A Board-conducted election was held on September 4, 2015 and a majority of the employees voted in favor of unionization. As a result, on September 14, 2015, the Union was certified as the exclusive collective-bargaining representative of the employees.[6] After the issuance of the certification, BFI and Leadpoint refused to recognize the Union. Based on their refusal to bargain, the Union filed an unfair labor practice charge, and Region 32 subsequently issued a Complaint and Notice of Hearing alleging that BFI and Leadpoint violated Section

[5] In granting the Union's Request for Review, the Board provided notice of its intent to "issue a subsequent notice establishing a schedule for the filing of briefs on review and inviting amicus briefs, to afford the parties and interested amici the opportunity to address issues raised in this case."

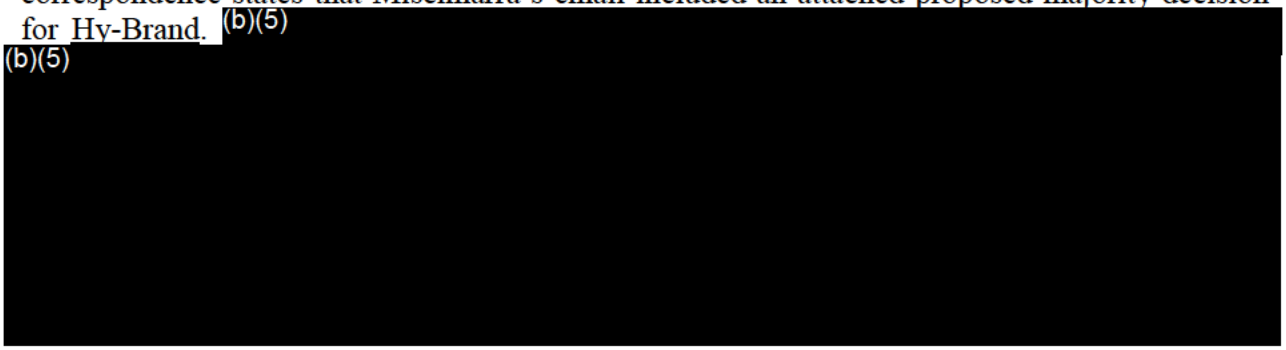
[6] The certificate of representation that issued in this case certified the Union as the exclusive-collective bargaining representative of the following unit of employees: "All full time and regular part-time employees employed by FRP-II, LLC. d/b/a/ Leadpoint Business Services and Browning-Ferris Industries of California, Inc., d/b/a Newby Island Recyclery, joint employers, at the facility located at 1601 Dixon Landing Rd., Milpitas California; excluding employees currently covered by collective bargaining agreements, office clerical employees, guards, and supervisors as defined in the Act."

8(a)(5). Upon the filing of BFI's Answer admitting its refusal to bargain, and claiming the Board improperly certified the Union, the General Counsel moved for summary judgment consistent with the processing of a standard test of certification case. Following BFI's and Leadpoint's respective responses to an order to show cause, the Board granted summary judgment and found BFI and Leadpoint violated section 8(a)(5) of the Act by refusing to recognize and bargain with the Union.[7] On January 20, 2016, BFI, through its legal representatives at the law firm of Seyfarth Shaw LLP, petitioned the D.C. Circuit Court of Appeals to review the Board's Order. Immediately thereafter the Board filed a cross-application for enforcement of its Decision and Order.[8] The case remained pending before the D.C. Circuit until late December of last year when it was remanded to the Board immediately following the Board's decision in Hy-Brand (see discussion below).

Procedural History of Hy-Brand

In Hy-Brand, Administrative Law Judge (ALJ) Robert Ringler found that Respondents Hy-Brand Industrial Contractors, LTD and Brandt Construction, Co. violated Section 8(a)(1), as single employers and joint employers, by unlawfully discharging seven employees because they engaged in protected concerted activity.[9] On January 9, 2017, the Respondents filed exceptions to the ALJD. Relevant here, one of the exceptions filed by the Respondents alleged that the ALJ erred in concluding that the Respondents "are single and joint employers, and are jointly and severally liable for the discharges." On January 23, 2017, the General Counsel filed cross-exceptions to the ALJD. Neither the Respondents, nor the General Counsel, requested in their respective exceptions and supporting briefs that the Board re-consider its standard for determining joint employer status.

As detailed in the IG Report, on October 18, 2017, then-Chairman Miscimarra, who was approaching the end of his term of office on December 16, 2017, sent an email message to then-Member Kaplan and Member Emanuel respecting Hy-Brand. The IG's summary of the correspondence states that Miscimarra's email included an attached proposed majority decision for Hy-Brand. (b)(5)



[7] The Board's decision in the test of certification case is reported at 363 NLRB No. 95 (2016).

[8] Leadpoint did not answer the Board's application for enforcement and no attorney filed a notice of appearance on Leadpoint's behalf. Consequently, Littler did not make an appearance on behalf of Leadpoint in the proceedings before the D.C. Circuit.

[9] Specifically, the ALJ found that the employees had engaged in a concerted work stoppage that constituted protected, concerted activity under Section 7 of the Act.

The Board ultimately issued a 3-2 Decision and Order in Hy-Brand on December 14, 2017. Then-Chairman Miscimarra, then-Member Kaplan and Member Emanuel, the Hy-Brand majority, concluded that the parties were in fact joint-employers; however, the decision went further and overruled the joint employer standard in Browning-Ferris.[10] A simple review of the Board's respective decisions in Browning-Ferris and Hy-Brand illustrates the conclusion in the IG Report that the Board majority simply made a "wholesale incorporation of the dissent in Browning-Ferris into the Hy-Brand majority decision." Id. at pg. 3. Specifically, the dissent in Browning-Ferris appears on pages 21-50 of that Board decision. The majority decision in Hy-Brand is on pages 1-35 of that case. Pages 21-48 from the dissent in Browning-Ferris are reproduced, almost word-for-word, with minor non-substantive modifications, on pages 3-30 of the Hy-Brand majority decision. Thus, 27 out of the 35 pages that constitute the decision of the Hy-Brand majority were essentially lifted, with little or no modification, directly from Browning-Ferris. To illustrate the commonality between the Browning-Ferris dissent and the Hy-Brand majority opinion, we have included with this report a series of attachments. Attachment "A" consists of the heart of the Browning-Ferris dissent authored by then-Member Miscimarra and then-Member Johnson. Attachment "B" consists of the majority decision in Hy-Brand authored by then-Chairman Miscimarra, then-Member Kaplan and Member Emanuel. Finally, Attachment "C" is the Hy-Brand majority's analysis of the specific facts and issues in Hy-Brand. A simple side-by-side comparison of Attachment "A" to Attachment "B" reveals that, other than inserting a few nonsubstantive revisions, the substantive analysis and arguments are exactly same. While the Hy-Brand majority incorporated 27 pages from the Browning-Ferris dissent, which was focused on the facts presented and issues raised in that case, the majority devoted only two paragraphs of its analysis to the specific facts and legal issues presented in Hy-Brand, as evidenced by Attachment "C."

Board Votes to Remand Browning-Ferris to the NLRB

Also relevant to the unique fact pattern here, Browning-Ferris, the lead case on the joint employer standard, was still a "live case" that was pending before the D.C. Circuit at the time that Hy-Brand issued. (b)(5)

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Thus, on December 19, 2017, the General Counsel filed a hat the court remand Browning-Ferris back to the Board. In support of remanding the case, the General Counsel noted that as a result of Hy-Brand, the

[10] "[W]e overrule Browning-Ferris." Hy-Brand, 365 NLRB No. 156, pg. 2 (2017).

Board has "overruled its Browning-Ferris decision" and thus the remand of Browning-Ferris was warranted " so that the Board may reconsider the case in light of its current precedent established in Hy-Brand Industrial Contractors, Ltd., 365 NLRB No. 156 (Dec. 14, 2017)." By an order dated December 22, 2017, the D.C. Circuit granted the Agency's request.[11]

Charging Parties in Hy-Brand File a Motion with the Board for Reconsideration, Recusal, and to Strike

On January 11, 2018, the Charging Parties in Hy-Brand filed a Motion for Reconsideration with the Board. In addition to making substantive arguments about the standard for joint employer status, the Charging Parties set forth their objections to "the Board's use of the Respondent's affirmed unfair labor practice as a vehicle to overturn *Browning-Ferris."* (p. 1). The Charging Parties contend that if the Board had made the parties and the public aware that it was considering reversing significant precedent, it would have had the opportunity to move to recuse Member Emanuel due to his "clear conflict of interest in *BFI."* (p. 2). Specifically, the Charging Parties assert that the decision in Hy-Brand "is no different than if Member Emanuel had directly participated in *BFI* where his former firm represents a party," and therefore, the government ethics rules bar him from participating in *Hy-Brand's* purported overruling of *BFI* as well as in any reconsideration of the case. (p. 12). According to the Charging Parties, Hy-Brand is "not a case where the Board simply disagrees with the legal standard applied in an earlier case" because the Hy-Brand decision "extensively discusses the facts in *BYI* and applies the law to those facts." (p. 13). The Motion requests that the Board reconsider the case; Member Emanuel recuse himself from participating in the reconsideration; the Board affirm the ALJ's decision on single-employer grounds; and the Board strike the reference to an analysis of joint employer status "as improper due to Member Emanuel's participation and as unnecessary *dicta*."

Analysis

The Ethics Pledge

Executive Order 13770 requires any "covered appointee" to sign an Ethics Pledge that contains several commitments. An appointee who signs the Pledge can only participate in a matter that falls within the Pledge's restrictions by seeking a waiver from the President. Pursuant to Paragraph 6 of the Pledge, Member Emanuel has agreed that he "will not for a period of 2 years from the date of my appointment participate in any particular matter involving specific parties that is directly and substantially related to my former employer or former clients, including regulations and contracts." This paragraph, read together with the definitions of "former employer," "former client," and "directly and substantially related" set forth in Executive Order 13770, prohibits his participation in a "particular matter involving specific

[11] Specifically, the D.C. Circuit's order states the following: "Upon consideration of the motion of the National Labor Relations Board for remand of the case to the Board for reconsideration in light of new Board precedent, it is ORDERED that the motion be granted and the case be remanded to the Board for further consideration in light of the Board's recent decision in Hy-Brand Industrial Contractors, Ltd., 365 NLRB No. 156 (Dec. 14, 2017)." On January 4, 2018, the Teamsters Union filed an Intervenor's Motion for Reconsideration of Order Remanding Case to National Labor Relations Board requesting that the D.C. Circuit reconsider remanding the case. On February 2, 2018, the D.C. Circuit denied the Intervenor's motion.

parties" in which his former employer or his own former clients are a party or the representative of a party.

(b)(5) Guidance issued by OGE explains that the prohibition on participation in matters involving former employers and former clients is intended to address those situations where a federal employee's "lingering affinity and mixed loyalties" could compromise his or her impartiality. See OGE, DO-09-011, pg. 5 (March 26, 2009).[12] The specific concern captured by the Pledge is that a reasonable person with knowledge of the relevant facts would be likely to question an appointee's impartiality in cases involving their former employer and/or their former clients upon leaving private practice and entering government service. In other words, a reasonable person would question the integrity of an agency's programs and operations if an appointee were to participate in maters encompassed by Par. 6 of the Pledge. For these reasons, the Pledge creates a "cooling off period" during which an appointee agrees to not participate in matters involving a former employer and/or former clients (b)(5) . The provision has some overlap with the impartiality regulations in 5 C.F.R. Sec. 2635.502 of the Standards of Conduct that identify conflicts that arise when a person with whom an employee has a "covered relationship" is or represents a party to a matter. The Pledge extends the one-year recusal period in the Standards of Conduct to two years when the covered relationship involves a former employer or a former client.

Although the above-cited definitions from the Executive Order appear to narrow the scope of Paragraph 6 and create a bright-line rule, we have learned in conversations with the Office of Government Ethics (OGE) that this provision in fact leaves room for interpretation by an individual agency, and that a violation may occur in a less straightforward scenario when the policies that underlie the provision have been implicated.[13]

Under the Ethics Pledge, Member Emanuel may not participate in Browning-Ferris, because Littler represents Leadpoint and there is an appearance concern that he cannot be a neutral adjudicator because of loyalty to his former employer. However, the decision that he adopted in Hy-Brand was taken wholesale from the dissenting opinion in Browning-Ferris, and is thus based on internal Board deliberations in a case where Littler represented a party and submitted briefs. Further, because of the wholesale adoption of that opinion, Member Emanuel not only changed the joint employer standard to that which had been advanced by Littler, but included text from the pre-existing opinion applying that standard to the facts of Browning-Ferris. Further, he then participated in a vote to ask the court to remand Browning-Ferris to the Board.[14] It is reasonable to conclude that by using Hy-Brand as a vehicle to affect a case from

[12] This guidance was issued to assist in interpreting the corresponding provision of the Obama Ethics Pledge, and states on its face that it is applicable to the Trump Ethics Pledge as well.

(b)(5)

[14] We recognize that Littler did not file a notice of appearance before the D.C. Circuit, and that the Board's vote to instruct the General Counsel to move the court to remand the case ultimately became "harmless error" because of the way the events unfolded. However, we rely on this conduct as part of the series of events that determines the context for the events at issue here.

which he was recused (Browning-Ferris), the concerns that underlie the Pledge were implicated as Member Emanuel was evaluating and incorporating, to a large degree, deliberative information from a case in which he was recused.

We have looked to the APA and due process cases concerning the appearance of bias to support our recommended case-related remedy.

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C.F.R. § 2635.502(c) give the Agency's Designated Agency Ethics Official authority to "make an independent determination as to whether a reasonable person with knowledge of the relevant facts would be likely to question the employee's impartiality in the matter."

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UNITED STATES GOVERNMENT

National Labor Relations Board

Memorandum

TO: Dwight Bostwick, Zuckerman Spaeder LLP
Attorney for Board Member Bill Emanuel

FROM: Lori Ketcham
Associate General Counsel, Ethics
Designated Agency Ethics Official

SUBJECT: Finding of Trump Ethics Pledge Violation Respecting the Board's Adjudication of Hy-Brand Industrial Contractors, Ltd., 365 NLRB No. 156 (2017)

DATE: March 27, 2018

Overview

This memo explains my determination, consistent with that of the NLRB's Inspector General (IG), that Board member Bill Emanuel's participation in the manner in which the Board majority adjudicated Hy-Brand Industrial Contractors, Ltd., 365 NLRB No. 156 (2017), violated Paragraph 6 of the Trump Ethics Pledge (Ethics Pledge). [1] My determination in this matter is based on the totality of the circumstances presented, including that the majority decision in Hy-Brand is based on a wholesale incorporation of the dissenting opinion in Browning-Ferris, which resulted from the Board's deliberations in a case in which Member Emanuel's former firm represented a party and filed briefs on the issue of the joint employer standard. In order to illustrate that the ethics concerns here are based on the totality of the unique facts presented, I will start by examining in depth the procedural history of both Browning-Ferris and Hy-Brand.

[1]The IG issued a report on February 9, 2018 titled "Notification of a Serious and Flagrant Problem and/or Deficiency in the Board's Administration of its Deliberative Process and the National Labor Relations Act with Respect to the Deliberation of a Particular Matter." The IG found that, due to the manner in which the Board majority adjudicated Hy-Brand, it had effectively become the same "particular matter involving specific parties" as Browning-Ferris Industries of California, Inc. d/b/a BFI Newby Island Recyclery, 362 NLRB No. 186 (2015). On February 15, 2018, the Board forwarded a copy of the IG Report to Congress with a cover letter stating that it is "evaluating the Inspector General's findings, considering appropriate actions related to Hy-Brand Industrial Contractors, Ltd., 365 NLRB No. 156 (2017), and reviewing current procedures for highlighting and addressing recusal issues with the assistance of the Board's Designated Agency Ethics Official."

Relevant Facts

1. Procedural History of Browning-Ferris

Browning-Ferris originated with the Board's processing of a representation petition filed in Region 32 by the Sanitary Truck Drivers and Helpers Local 350, International Brotherhood of Teamsters (the Union) seeking to represent a unit of approximately 120 workers at a recycling facility operated by Browning-Ferris Industries of California (BFI).[2] The petitioned-for employees were provided by Leadpoint Business Services (Leadpoint), a supplier employer, to BFI, the user employer. The Union alleged that BFI and Leadpoint were joint employers for the petitioned-for employees. Both Leadpoint and BFI argued that Leadpoint was the sole employer of those employees. Relevant here, Leadpoint was represented by the law firm Littler Mendelson (Littler), Member Emanuel's former employer, in the representation proceedings in Region 32 and in subsequent proceedings before the Board.

The Region issued a Decision and Direction of Election (DDE) on August 16, 2013, finding that "Leadpoint [is] the sole employer of the employees in question at BFI's Facility and that [the Union's] arguments for joint employer status between BFI and Leadpoint are unconvincing." Id. at pg. 19. Subsequently, on September 3, 2013, the Union filed a Request for Review of the DDE alleging that the Region misapplied the existing Board precedent, and in the alternative, that the Board should reconsider the standard for determining joint employer status. Littler, on behalf of Leadpoint, filed an Opposition to the Request for Review on September 10, 2013, stating that the DDE correctly concluded that Leadpoint was the sole employer. On April 30, 2014, the Board granted the Union's Request for Review.[3] Thereafter, on May 12, 2014, the Board issued a Notice and Invitation to File Briefs soliciting comments from the parties, and interested amici, respecting the following: (1) "whether under the Board's current joint-employer standard" Leadpoint was the "sole employer of the petitioned-for employees" in the unit; (2) whether the "Board [should] adhere to its existing joint-employer standard or adopt a new standard" and; (3) "if the Board adopts a new standard for determining joint-employer status, what should that standard be."

Numerous parties filed amici briefs in response to the Board's invitation. Littler filed its briefs as Leadpoint's counsel on June 26 and July 10, 2014, arguing that Leadpoint alone was the employer of the employees and that the Board did not need to revisit its formula for determining joint employer status. The Board issued its Decision on Review and Direction in Browning-Ferris on August 27, 2015, in which it held that Leadpoint and BFI were joint employers under the Act. In reaching this decision, the Board majority in Browning-Ferris adopted a new joint employer standard that no longer required a showing that a putative joint employer actually exercised direct and immediate control over workers' terms and conditions of employment, but that the mere existence of reserved joint control would suffice. Then-Member Miscimarra and

[2] Case No. 32-RC-109684 was filed on July 22, 2013.

[3] In granting the Union's Request for Review, the Board provided notice of its intent to "issue a subsequent notice establishing a schedule for the filing of briefs on review and inviting amicus briefs, to afford the parties and interested amici the opportunity to address issues raised in this case."

then-Member Johnson authored a 29-page dissent to the majority opinion. Consistent with the position advocated in the briefs filed by Littler, the Browning-Ferris dissent argued that BFI and Leadpoint are not joint employers and that the Board should not have altered its joint employer standard.

A Board-conducted election was held on September 4, 2015, and a majority of the employees voted in favor of unionization. As a result, on September 14, 2015, the Union was certified as the exclusive collective-bargaining representative of the employees.[4] After the issuance of the certification, BFI and Leadpoint refused to recognize the Union. Based on their refusal to bargain, the Union filed an unfair labor practice charge, and Region 32 subsequently issued a Complaint and Notice of Hearing alleging that BFI and Leadpoint had violated Section 8(a)(5) of the National Labor Relations Act (NLRA). Upon the filing of BFI's Answer admitting its refusal to bargain and claiming the Board improperly certified the Union, the General Counsel moved for summary judgment consistent with the processing of a standard test of certification case. Following BFI's and Leadpoint's respective responses to an order to show cause, the Board issued a Decision and Order granting summary judgment and found BFI and Leadpoint had violated Section 8(a)(5) of the Act by refusing to recognize and bargain with the Union.[5] On January 20, 2016, BFI, through its legal representatives at the law firm of Seyfarth Shaw LLP, petitioned the D.C. Circuit Court of Appeals to review the Board's Decision and Order, and immediately thereafter the Board filed a cross-application for enforcement.[6] The test of certification case remained pending before the D.C. Circuit until late December 2017, when it was remanded to the Board immediately following the Board's issuance of its decision in Hy-Brand (see discussion below).

2. Procedural History of Hy-Brand

In Hy-Brand, the Administrative Law Judge (ALJ) found that Respondents Hy-Brand Industrial Contractors, LTD and Brandt Construction, Co. (Respondents) violated Section 8(a)(1) of the NLRA, as single employers and joint employers, by unlawfully discharging seven employees because they engaged in protected concerted activity. The Respondents filed exceptions to the ALJ Decision (ALJD). One of the exceptions alleged that the ALJ erred in concluding that the Respondents "are single and joint employers, and are jointly and severally liable for the discharges." On January 23, 2017, the General Counsel filed cross-exceptions to the ALJD. Neither the Respondents, nor the General Counsel, requested in their respective exceptions and supporting briefs that the Board re-consider its standard for determining joint employer status.

[4] The certificate of representation that issued in this case certified the Union as the exclusive collective-bargaining representative of the following unit of employees: "All full time and regular part-time employees employed by FRP-II, LLC. d/b/a/ Leadpoint Business Services and Browning-Ferris Industries of California, Inc., d/b/a Newby Island Recyclery, joint employers, at the facility located at 1601 Dixon Landing Rd., Milpitas California; excluding employees currently covered by collective bargaining agreements, office clerical employees, guards, and supervisors as defined in the Act."

[5] The Board's decision in the test of certification case is reported at 363 NLRB No. 95 (2016).

[6] Leadpoint did not answer the Board's application for enforcement and no attorney filed a notice of appearance on Leadpoint's behalf. Consequently, Littler did not make an appearance on behalf of Leadpoint in the proceedings before the D.C. Circuit.

As detailed in the IG Report, on October 18, 2017, as the end of his term approached, then-Chairman Miscimarra sent an email message to Member Emanuel and then-Member Kaplan respecting Hy-Brand, but discussing information pertaining to the Board's internal deliberations in the adjudication of Browning-Ferris.

On December 14, 2017, the Board issued a 3-2 Decision and Order in Hy-Brand, finding that the parties were joint employers. In addition, the Hy-Brand majority, which consisted of Member Emanuel, then-Chairman Miscimarra, and then-Member Kaplan, overruled the joint employer standard that had been established in Browning-Ferris, returning to the pre-existing standard advocated by Littler and by the dissenting opinion in Browning-Ferris.[7] The Board in Hy-Brand had not solicited amici briefs on the issue. However, the Hy-Brand majority indicated that its decision was in fact responsive to the briefing, including amici briefing, associated with Browning-Ferris. Thus, the Hy-Brand majority wrote, "Additionally, the issue we decide today was the subject of amicus briefing when the Board decided *Browning-Ferris*." 365 NLRB No. 156, slip op. at 33.

Further, a review of the Board's respective decisions in Browning-Ferris and Hy-Brand demonstrates that the Browning-Ferris dissent was used by the Board majority in its Hy-Brand decision. Specifically, the dissent in Browning-Ferris appears on pages 21-50 of that Board decision. Pages 21-48 from the dissent in Browning-Ferris are reproduced, almost word-for-word, on pages 3-30 of the Hy-Brand majority decision. Thus, 27 out of the 35 pages that constitute the decision of the Hy-Brand majority were essentially lifted, with little or no modification, directly from the Browning-Ferris dissent. The majority opinion in Hy-Brand contains an analysis of the relevant facts in Browning-Ferris concerning the joint employer status of Leadpoint and BFI, and in this analysis, the Hy-Brand majority utilizes the pre-Browning-Ferris standard that it reinstated in Hy-Brand. 365 NLRB No. 156, slip op. at 18-19. Specifically, the Board majority in Hy-Brand reached the following conclusion based on language that it incorporated from the Browning-Ferris dissent: "That is all there was, and the Regional Director correctly decided under then-extant law that it was not enough to show BFI was the joint employer of Leadpoint's employees." 365 NLRB No. 156, slip op. at 19. The Hy-Brand majority devoted two paragraphs of its analysis to analyzing the alleged joint-employer status of Hy-Brand Industrial Contractors, LTD and Brandt Construction, Co., the Respondents in the Hy-Brand case. 365 NLRB No. 156, slip op. at 30-31.

3. Browning-Ferris is Remanded to the NLRB

Also relevant to the unique fact pattern here, when Hy-Brand issued, Browning-Ferris, which had been the Board's lead case on the joint employer standard, was still a "live case" that was pending before the D.C. Circuit. After voting with the Hy-Brand majority to overrule the joint employer standard set forth in Browning-Ferris, Member Emanuel then participated in an effort to direct the General Counsel to seek remand of several Board decisions pending in federal courts, including Browning-Ferris.[8]

[7] "[W]e overrule Browning-Ferris." Hy-Brand, 365 NLRB No. 156, slip op. at 2.

[8] After further consideration of the issue, the Board unanimously agreed to rescind its directive to the General Counsel. Thereafter, on December 19, 2017, the General Counsel filed a motion in the D.C. Circuit requesting that the court remand Browning-Ferris back to the Board. By an order dated December 22, 2017, the D.C. Circuit

4. Charging Parties in Hy-Brand File a Motion with the Board for Reconsideration, Recusal, and to Strike

On January 11, 2018, the Charging Parties in Hy-Brand filed a Motion for Reconsideration with the Board. In addition to making substantive arguments about the standard for joint employer status, the Charging Parties set forth their objections to "the Board's use of the Respondent's affirmed unfair labor practice as a vehicle to overturn *Browning-Ferris."* Mot. For Recons., p. 1. The Charging Parties contend that if the Board had made the parties and the public aware that it was considering reversing significant precedent, it would have had the opportunity to move to recuse Member Emanuel due to his "clear conflict of interest in *BFI."* Id. at 2. Specifically, the Charging Parties assert that the decision in Hy-Brand "is no different than if Member Emanuel had directly participated in *BFI* where his former firm represents a party," and therefore, the government ethics rules bar him from participating in *Hy-Brand's* purported overruling of *BFI* as well as in any reconsideration of the case. Id. at 12. According to the Charging Parties, Hy-Brand is "not a case where the Board simply disagrees with the legal standard applied in an earlier case" because the Hy-Brand decision "extensively discusses the facts in *BFI* and applies the law to those facts." Id. at 13. The Motion requests that the Board reconsider the case; Member Emanuel recuse himself from participating in the reconsideration; the Board affirm the ALJ's Decision on single-employer grounds; and the Board strike the reference to an analysis of joint employer status "as improper due to Member Emanuel's participation and as unnecessary *dicta*."[9]

On January 25, 2018, the Respondents filed an Opposition to Charging Parties' Motion for Reconsideration, Recusal, and to Strike the Board's Decision (Opposition). In its Opposition, the Respondents contend that the Charging Parties' Motion fails to meet the requirements of § 102.48(d)(1)[10] because the "Charging Parties have made no showing of either extraordinary circumstances or material error requiring reconsideration." Opp'n to Mot. For Recons., 2. Moreover, the Respondents assert that because "BFI was cited by the ALJ as the basis for his decision on the joint employer issue"..."it was entirely proper for the Board to return to the well-

granted the Agency's request. Specifically, the D.C. Circuit's order states the following: "Upon consideration of the motion of the National Labor Relations Board for remand of the case to the Board for reconsideration in light of new Board precedent, it is ORDERED that the motion be granted and the case be remanded to the Board for further consideration in light of the Board's recent decision in Hy-Brand Industrial Contractors, Ltd., 365 NLRB No. 156 (Dec. 14, 2017)." On January 4, 2018, the Teamsters Union filed an Intervenor's Motion for Reconsideration of Order Remanding Case to National Labor Relations Board requesting that the D.C. Circuit reconsider its decision remanding the case. On February 2, 2018, the D.C. Circuit denied the Intervenor's motion.

[9] On January 25, the NLRB's General Counsel filed a response taking no position on the Charging Parties' motion.

[10] Section 102.48(d)(1) of the Board's Rules and Regulations states the following: "A party to a proceeding before the Board may, because of extraordinary circumstances, move for reconsideration, rehearing, or reopening of the record after the Board decision or order. A motion for reconsideration shall state with particularity the material error claimed and with respect to any finding of material fact shall specify the page of the record relied on. A motion for rehearing shall specify the error alleged to require a hearing de novo and the prejudice to the movant alleged to result from such error. A motion to reopen the record shall state briefly the additional evidence sought to be adduced, why it was not presented previously, and that, if adduced and credited, it would require a different result. Only newly discovered evidence, evidence which has become available only since the close of the hearing, or evidence which the Board believes should have been taken at the hearing will be taken at any further hearing."

know[n] standard" in Hy-Brand. Id. at 3. The Opposition also asserts that Member Emanuel "had no duty to recuse himself" as he never "represented the Charging Parties or Respondents." Id. at 4. In support, Respondents contend that the Charging Parties are stating a higher recusal standard than that applied by former Member Becker in addressing various recusal motions in SEIU, Local 122RN, 355 NLRB 234, 246 (2010). Specifically, Respondents note that "Member Becker's determination to recuse himself was based on his work for particular clients" and "Member Becker's interpretation of judicial standards and ethical rules equally apply to Member Emanuel." Opp'n to Mot. For Recons., Id. at 5. The Respondents also maintain that the Motion for Reconsideration should be denied because the Charging Parties are simply using it as a "vehicle to procure a second bite at the apple with the undisguised desire that the former Chairman's departure from the Board will now allow the dissent to become the majority opinion." Id. at 1.

Analysis under the Ethics Pledge

Executive Order 13770 (Executive Order) requires any "covered appointee" to sign an Ethics Pledge (Pledge) that contains several commitments. An appointee who signs the Pledge can only participate in a matter that falls within the Pledge's restrictions by seeking a waiver from the President. Pursuant to Paragraph 6 of the Pledge, Member Emanuel has agreed that he "will not for a period of 2 years from the date of my appointment participate in any particular matter involving specific parties that is directly and substantially related to my former employer or former clients, including regulations and contracts." This paragraph, read together with the definitions of "former employer," "former client," and "directly and substantially related" set forth in Executive Order 13770, prohibits his participation in a "particular matter involving specific parties" in which his former employer or his own former clients are a party or the representative of a party.

Guidance issued by the Office of Government Ethics (OGE) explains that the prohibition in Paragraph 6 is intended to address those situations where a federal employee's "lingering affinity and mixed loyalties" to a former employer and/or former clients could compromise his or her impartiality. See OGE, DO-09-011, pg. 5 (Ethics Pledge: Revolving Door Ban -- All Appointees Entering Government) (March 26, 2009).[11] The specific concern captured by the Pledge is that a reasonable person with knowledge of the relevant facts would be likely to question an appointee's impartiality, upon leaving private practice and entering government service, in cases in which their former employers or former clients are parties or the representatives of parties. In other words, a reasonable person would question the integrity of an agency's programs and operations if an appointee were to participate in matters encompassed by Paragraph 6 of the Pledge. For these reasons, the Pledge creates a two-year "cooling off period" during which an appointee agrees to not participate in matters in which a former employer and/or former clients are parties or representatives. The provision has some overlap with the impartiality regulations in 5 C.F.R. § 2635.502 of the Standards of Ethical Conduct for Employees of the Executive Branch (Standards of Ethical Conduct) that identify conflicts which arise when a person with whom an employee has a "covered relationship" is or represents a party

[11] DO-09-11 was issued to assist in interpreting the corresponding provision of the Obama Ethics Pledge (Par. 2), and states on its face that its substantive legal interpretations pertaining to that provision are applicable to the Trump Ethics Pledge as well. Accord LA-17-03 (Guidance on Executive Order 13770) (March 20, 2017).

to a matter. The Pledge extends the one-year recusal period in the Standards of Ethical Conduct to two years when the covered relationship involves a former employer or a former client.[12] See DO-09-011, pp. 5-6, which explains the relationship between the Pledge provision and the impartiality provisions in the Standards of Ethical Conduct.

Although the above-cited definitions from the Executive Order appear to create a bright-line rule in Paragraph 6, I have learned in conversations with OGE that this provision in fact leaves room for interpretation by an individual agency. Thus, the policies that underlie the provision may come into play when the totality of the circumstances demonstrate participation in a matter involving a representation by a former employer, even if this representation is not readily apparent. In this case, the initial assignment of Hy-Brand to Member Emanuel did not cause concern under relevant ethics rules or statutes. As to the Pledge, Member Emanuel's own former clients were not parties, and Littler did not represent a party to the matter. However, as the case progressed, the adjudication of Hy-Brand became intertwined with the adjudication of Browning-Ferris, a live case in which Littler represents Leadpoint. Under the totality of the unique circumstances that were present, for purposes of the Pledge, Member Emanuel participated in a case that essentially involved the representation of a party by Littler. For this reason, I have concluded that his conduct constituted a Pledge violation.[13]

Under Paragraph 6 of the Ethics Pledge, Member Emanuel is recused from participating in Browning-Ferris because Littler represents Leadpoint; this prohibition reflects an appearance concern that for two years from the date of his appointment, he cannot be a neutral adjudicator in cases in which Littler represents a party because of his loyalty to his former employer. The ethics concern arises because Member Emanuel, as a member of the Hy-Brand majority, overturned the Browning-Ferris standard in a majority decision that incorporated, wholesale, the dissent in Browning-Ferris. The dissent in Browning-Ferris was based on the Board's deliberations in a case where Littler represented a party and submitted briefs to the Board, on behalf of that party, regarding the joint employer issue.[14] Specifically, as explained earlier in this memo, a significant portion of the Hy-Brand majority opinion consists of 27 pages from the Browning-Ferris dissent, which goes far beyond simply commenting upon, describing, or addressing relevant Board precedent. Thus, Member Emanuel effectively stepped in the shoes of the Browning-Ferris dissenting Members. Moreover, because the majority transported the entire substantive analysis from the dissent in Browning-Ferris into the Hy-Brand majority decision, the resulting majority decision discusses the facts of Browning-Ferris and even incorporates preexisting text that applies the reinstated standard to those facts. This commonality is significant, and stands in contrast to the fact that the Hy-Brand majority devoted only two paragraphs of its analysis to determining whether Hy-Brand Industrial Contractors and Brandt Construction are joint employers. It is reasonable to conclude that the concerns that underlie the Pledge were implicated as Member Emanuel was evaluating and incorporating, to a large degree,

[12] 5 CFR § 2635.502(b)(4) states that an employee has a covered relationship with "[a]ny person for whom the employee has, within the last year, served as officer, director, trustee, general partner, agent, attorney, consultant, contractor or employee."

[13] My determination is based on the authority given to me as the NLRB's DAEO at 5 C.F.R. § 2635.502(a) and (c).

[14] Further, then-Chairman Miscimarra disclosed to Member Emanuel internal deliberative information regarding the adjudication of Browning-Ferris.

a dissenting opinion that was based on deliberations in a case in which Littler represented a party and filed briefs, and from which he was ethically recused. Further, the dissenting opinion in Browning-Ferris, which became the majority opinion in Hy-Brand, was consistent with the position advanced by Littler. This conduct could be perceived by a reasonable person as inconsistent with the Supreme Court's instruction that NLRB adjudications should be based on a "thoughtful and discriminating evaluation of the facts." N.L.R.B. v. Pittsburgh S.S. Co., 337 U.S. 656, 660 (1949).

In assessing the relevant facts, I also note that none of the parties in Hy-Brand requested that the Board reconsider the joint employer standard. Nor did the Board solicit amici briefs on that issue as it had done in Browning-Ferris. However, the Hy-Brand majority indicated that the decision was in fact responsive to the briefing, including amici briefing, associated with Browning-Ferris when it wrote the following: "Additionally, the issue we decide today was the subject of briefing when the Board decided *Browning-Ferris*." 365 NLRB No. 156, slip op. at 33. This fact underscores the commonality and overlap in the way that the two cases were adjudicated. Finally, after Hy-Brand issued, Member Emanuel participated in an effort to remand the open Browning-Ferris test of certification case back to the Board to be adjudicated under the new joint employer standard, which was consistent with the position advocated by his former firm, Littler, in Browning-Ferris.[15]

I want to emphasize that I have not concluded that Member Emanuel acted in bad faith in the adjudication of Hy-Brand. Rather, under the totality of the circumstances, he participated in the adjudication of a case in a manner which incorporated the adjudication of Browning-Ferris a case in which his former employer represented a party. This conduct, under the Pledge, would cause a reasonable person with knowledge of the relevant facts to question his impartiality because of concerns about "lingering affinity and mixed loyalties" to Littler that would make him predisposed to accept and adopt a position consistent with that of his former employer (OGE, DO-09-011, p. 5). Cf. Amos Treat & Co. v. Sec. & Exch. Comm'n, 306 F.2d 260, 263 (D.C. Cir. 1962) ("As the Supreme Court has said in other contexts: 'A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness.'") For these reasons, I believe that Member Emanuel's participation in the adjudication of Hy-Brand, including the wholesale incorporation of the dissenting opinion in Browning-Ferris, which resulted from the Board's deliberations in a still pending case in which Littler represented a party and took the same position on the issue of the joint employer standard that Member Emanuel ultimately endorsed, violated the Ethics Pledge.

[15] I recognize that Littler did not file a notice of appearance before the D.C. Circuit, and that the Board's vote to instruct the General Counsel to move the court to remand the case ultimately was rescinded. However, I rely on this conduct as part of the series of events that determines the context for the events at issue here.

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(Supersedes February 2008 Version)

U.S. OFFICE OF GOVERNMENT ETHICS

GUIDE TO DRAFTING ETHICS AGREEMENTS FOR PAS NOMINEES

NOTICE: This guide does not contain legal advice. It is intended solely for educational purposes for ethics officials in the Federal executive branch.

INTRODUCTION

In DAEOgram DO-01-013 (Mar. 28, 2001), OGE first provided guidance to agency reviewers who draft ethics agreements for nominees to positions requiring Senate confirmation ("PAS nominees"). A model ethics agreement that accompanied that issuance served as a valuable starting point for the ethics agreements of countless PAS nominees. Over the years, OGE has had the benefit of working closely with agency reviewers to develop ethics agreement language addressing a variety of circumstances. The result has been a body of work that represents the joint product of OGE and the agencies to which PAS nominees are appointed.

That body of work is reflected in this guide, which OGE first issued in February 2008 and is reissuing in 2014 with updates based on the ethics community's experience using this guide. This updated guide contains sample language and commentary designed to enhance the quality of PAS nominee ethics agreements. Our intention is to spread the benefit of individual experiences with such agreements evenly across the Federal executive branch. These samples have made the certification process considerably more efficient for PAS nominees in the time since the guide's first issuance in 2008. These samples also have established consistency among the ethics agreements of different agencies.

This guide focuses primarily on sample language, but a number of considerations are relevant to the process of drafting ethics agreements for PAS nominees. The key consideration is that the agency and OGE both have active roles in the process, and this shared responsibility requires coordination at the earliest practicable stages. In addition, OGE's approval of the language of an ethics agreement must be obtained before a PAS nominee's financial disclosure report can be certified. As you use this guide, it also may help to keep in mind the following nonexclusive list of some of the characteristics of executive branch ethics agreements:

1. The agreement is a joint product.

The ethics agreement is a joint product of the agency, OGE and the Office of the Counsel to the President, with input from the PAS nominee. As a result, the process is collaborative. OGE's approval of the language of the ethics agreement is a precondition for certification of the PAS nominee's financial disclosure report.

2. The underlying conflicts analysis is comprehensive.

Before drafting the ethics agreement, the reviewer completes a comprehensive conflicts analysis. Under 18 U.S.C. § 208, for example, the reviewer evaluates all "particular matters" that will have a direct and predictable effect on the PAS nominee's financial interests. The subset of "particular matters involving specific parties" often is the easiest to identify, but the reviewer also considers the subset of "particular matters of general applicability." See OGE DAEOgram DO-06-029 (Oct. 4, 2006). In appropriate cases, the reviewer considers other applicable legal authorities, including the following: 18 U.S.C. §§ 203, 205, 209; 5 C.F.R. §§ 2635.502, 2635.503, 2635.807, 2636.305, 2636.306; Executive Order 12674, § 102 (1989), as amended by Executive Order 12731 (1990); and Executive Order 13490 (2009).

3. The agreement is a statement of relevant commitments.

The PAS nominee's ethics agreement is a statement of relevant commitments. It describes a specific course of action that the PAS nominee will undertake to achieve compliance with specific legal authorities. It typically does not include generic statements regarding compliance with a broad range of legal authorities. It also typically does not explain the reasons for the PAS nominee's commitments, inasmuch as the inclusion of explanations can create an incorrect impression that these commitments are conditional. Except in very rare circumstances, the only condition precedent in a PAS nominee's ethics agreement is confirmation by the Senate.

4. The agreement is factually accurate.

Although this guide contains a number of samples, each PAS nominee's circumstances are unique and the legal document addressing those circumstances is unique. The sample language serves only as the starting point for an individualized ethics agreement. Even before beginning to draft the agreement, the reviewer works with the PAS nominee to develop the details of the PAS nominee's ethics commitments. For example, the reviewer inquires about the details of items such as the following: the amount and timing of any payments; the existence of contingencies affecting payments; the planned disposition of all equity interests in an employer (e.g., a plan to accelerate the vesting of restricted stock, a plan to forfeit unvested stock options, etc.); the terms of a deferred compensation plan; the handling of accounts receivable; arrangements for future employment; arrangements with publishers; etc. Also, when analyzing a payment under 18 U.S.C. § 209, the reviewer acquires sufficient information to consider the factors identified in OGE's "Summary of the Restriction on Supplementation of Salary." DAEOgram DO-02-016, DO-02-016A (Jul. 1, 2002).

5. The agreement is complete.

When reviewing the financial disclosure reports of PAS nominees, who are the most senior leaders in the Federal executive branch, a reviewer does not rely on the same "review assumptions" that sometimes apply to other financial disclosure reports. A reviewer discusses the completeness of a financial disclosure report with a PAS nominee who is confused about disclosure requirements. Although the reviewer is not an investigator and is not expected to uncover all undisclosed financial interests, experience and judgment lead the reviewer to inquire about the existence of certain likely interests. See DAEOgram DO-08-002 (Jan. 25, 2008). For example, a reviewer might ask whether a PAS nominee holds a position with a family limited partnership if the PAS nominee has not disclosed any such position but has disclosed an equity interest in the partnership. Similarly, a reviewer might ask whether a PAS nominee has an equity interest in an employer if the PAS nominee has not disclosed any such interests but has disclosed a position as a highly-paid executive. The best time for such discussions is naturally before the reviewer drafts the ethics agreement.

6. The commitments are feasible.

The ethics agreement communicates commitments, not mere aspirations. For this reason, reviewers sometimes need assurances in advance that PAS nominees will be able to honor stated

commitments. For example, if a PAS nominee expects to receive a nonstandard severance payment from an employer before entering Federal service, the reviewer needs assurance that the employer is capable of making the payment at the planned time. This assurance is necessary because the applicability of either 5 C.F.R. § 2635.503 or 18 U.S.C. § 209 depends on whether the payment occurs before or after the PAS nominee enters Federal service. Similarly, if a PAS nominee agrees to divest a pooled investment fund within ninety days of confirmation, the reviewer needs assurance that the PAS nominee is not subject to a lock-in provision that prohibits divestiture for a longer period of time.

7. *The language of the agreement is concise.*

Ideally, the ethics agreement contains only a concise statement of relevant commitments by the PAS nominee. Extraneous information may distract from the statement of relevant commitments. At the same time, being concise does not always mean keeping the agreement short. The agreement should address every relevant commitment in sufficient detail to be clear about the specific actions that the PAS nominee will undertake.

8. The language of the agreement is precise.

As emphasized in DAEOgram DO-01-013 (Mar. 28, 2001), the ethics agreement makes clear what measures a PAS nominee will undertake. Reviewers strive to minimize the potential for inconsistent interpretations because the agreement's audience eventually could include the PAS nominee, the agency, the Inspector General, OGE, the White House, the Senate, the House of Representatives, and members of the general public. Ambiguity leaves a PAS nominee vulnerable if it leads to differing interpretations of the stated commitments among the members of this audience. The ethics agreement reduces ambiguity by being specific about such matters as the following: the scope of any recusal, both as to the types of matters from which the PAS nominee will recuse and the duration of the recusal; the timing of any divestiture or payment; arrangements for separating from an employer; arrangements for dissolving a business; the steps the PAS nominee will take to divest any privately held equity; any intention to seek a waiver or authorization; and the details of any other measure to resolve a conflict or the appearance of a conflict.

9. The language of the agreement is consistent.

The language of the agreement is consistent. Reviewers strive to eliminate inadvertent variations of language because readers might mistakenly attribute meaning to such variations. For example, omitting the phrase "personally and substantially" from a recusal could cause confusion when other recusals in the agreement contain this phrase. Similar confusion with regard to a recusal can stem from omitting the word "first" in the phrases "unless I first obtain a written waiver" and "unless I am first authorized to participate, pursuant to 5 C.F.R. § 2635.502(d)." Also, varying the name by which an ethics agreement refers to an organization could cause confusion if another organization has a similar name. While there often is only a small risk of confusion as a result of such variations, it takes very little effort to eliminate that risk altogether.

10. The agreement is not a comprehensive counseling document.

Consistent with the admonition to be concise, most agencies do not attempt to use the ethics agreement as the PAS nominee's all-purpose introduction to ethics requirements in the Federal executive branch. The ethics agreement could not cover every applicable ethics requirement without sacrificing accuracy or obscuring relevant commitments. Any attempt to discuss general ethics requirements extensively may create a false impression that the agreement covers everything the PAS nominee needs to know about ethics. For this reason, the agency may choose to create a separate counseling document that introduces its PAS nominees to issues they are likely to encounter at the agency.

11. The PAS nominee signals a commitment to ethical leadership by signing the ethics agreement.

Throughout the Federal executive branch, the traditional practice of most agencies has been to prepare ethics agreements in the form of letters from PAS nominees to Designated Agency Ethics Officials. By signing such letters, the PAS nominees signal their commitment to ethical leadership. Their signatures also offer assurances that the PAS nominees are aware of the measures needed to achieve compliance with applicable ethics requirements.

12. Commitments in the agreement may not be rescinded without OGE's prior approval.

The ethics agreement is an agreement between the PAS nominee, the agency, and OGE. In addition, the United States Senate relies on the commitments reflected in the ethics agreement when making a decision to confirm the PAS nominee. For this reason, the agency and the PAS nominee may not rescind a commitment in an ethics agreement, such as an agreement to divest an asset, without first obtaining OGE's approval.

TABLE OF SAMPLES

The following samples are organized by subject. Because OGE may update this guide, OGE has employed a numbering system that permits the insertion of new samples without renumbering the existing samples.

CHAPTER 1: SAMPLE ETHICS AGREEMENT

1.0.0 – sample ethics agreement

Comment:

The following sample ethics agreement incorporates several of the individual sample paragraphs that appear in this guide. The purpose of this sample ethics agreement is to demonstrate the structure of an ethics agreement. For language addressing the specific circumstances of a particular PAS nominee, please refer to the individual sample paragraphs throughout this guide. The comments associated with those individual sample paragraphs explain the purpose of the language that they employ.

Sample Language:

May 15, 2017

Ms. Deborah McGonagall
Designated Agency Ethics Official
Department of Government Operations
1201 New York Avenue, NW, Suite 500
Washington, DC 20005

Dear Ms. McGonagall:

The purpose of this letter is to describe the steps that I will take to avoid any actual or apparent conflict of interest in the event that I am confirmed for the position of Deputy Secretary of the Department of Government Operations.

As required by 18 U.S.C. § 208(a), I will not participate personally and substantially in any particular matter in which I know that I have a financial interest directly and predictably affected by the matter, or in which I know that a person whose interests are imputed to me has a financial interest directly and predictably affected by the matter, unless I first obtain a written waiver, pursuant to 18 U.S.C. § 208(b)(1), or qualify for a regulatory exemption, pursuant to 18 U.S.C. § 208(b)(2). I understand that the interests of the following persons are imputed to me: any spouse or minor child of mine; any general partner of a partnership in which I am a limited or general partner; any organization in which I serve as officer, director, trustee, general partner or employee; and any person or organization with which I am negotiating or have an arrangement concerning prospective employment.

Within 90 days of my confirmation, I will divest my interests in the following entities: MacDonald Wilderness, Inc.; Nonluecha Power Saws, LLC; H. Jones Worldwide Investigations, Co.; and Syme Environmental Consulting, LP. With regard to each of these entities, I will not participate personally and substantially in any particular matter that to my knowledge has a direct and predictable effect on the financial interests of the entity until I have divested it, unless I first

obtain a written waiver, pursuant to 18 U.S.C. § 208(b)(1), or qualify for a regulatory exemption, pursuant to 18 U.S.C. § 208(b)(2).

Upon confirmation, I will resign from my position with Mabry Shipping, Inc. I hold stock and vested stock options with Mabry Shipping, Inc. I do not hold unvested stock options or restricted stock. Following my appointment, I will divest my vested stock options and stock in Mabry Shipping, Inc., within 90 days of my confirmation. If I divest the stock options by exercising them, I will divest the resulting stock within 90 days of my confirmation. I will not participate personally and substantially in any particular matter that to my knowledge has a direct and predictable effect on the financial interests of this entity until I have divested it, unless I first obtain a written waiver, pursuant to 18 U.S.C. § 208(b)(1), or qualify for a regulatory exemption, pursuant to 18 U.S.C. § 208(b)(2). For a period of one year after my resignation, I will not participate personally and substantially in any particular matter involving specific parties in which I know Mabry Shipping, Inc., is a party or represents a party, unless I am first authorized to participate, pursuant to 5 C.F.R. § 2635.502(d).

Upon confirmation, I will resign from my position with Forest Enterprises, Inc. Before I assume the duties of the position of Deputy Secretary, I will receive a severance payment from Forest Enterprises, Inc. For a period of two years after my receipt of this payment, I will not participate personally and substantially in any particular matter in which I know Forest Enterprises, Inc., is a party or represents a party, unless I first receive a written waiver pursuant to 5 C.F.R. § 2635.503(c).

Upon confirmation, I will resign from my positions with the following entities: The Charity Foundation; Nationwide Labedz, Inc.; and Newton Corp. For a period of one year after my resignation from each of these entities, I will not participate personally and substantially in any particular matter involving specific parties in which I know that entity is a party or represents a party, unless I am first authorized to participate, pursuant to 5 C.F.R. § 2635.502(d).

My spouse is employed by the law firm of Granahan & Khaner, PC, from which he receives a fixed salary and an annual bonus tied to his performance. For as long as my spouse continues to work for Granahan & Khaner, PC, I will not participate personally and substantially in any particular matter that to my knowledge has a direct and predictable effect on my spouse's compensation or employment with the firm, unless I first obtain a written waiver, pursuant to 18 U.S.C. § 208(b)(1). I also will not participate personally and substantially in any particular matter involving specific parties in which I know my spouse's employer or any client of my spouse is a party or represents a party, unless I am first authorized to participate, pursuant to 5 C.F.R. § 2635.502(d).

I understand that I may be eligible to request a Certificate of Divestiture for qualifying assets and that a Certificate of Divestiture is effective only if obtained prior to divestiture. Regardless of whether I receive a Certificate of Divestiture, I will ensure that all divestitures discussed in this agreement occur within the agreed upon timeframes and that all proceeds are invested in non-conflicting assets.

I have been advised that this ethics agreement will be posted publicly, consistent with 5 U.S.C. § 552, on the website of the U.S. Office of Government Ethics with ethics agreements of other Presidential nominees who file public financial disclosure reports.

Sincerely,

John Doe

1.1.0 – introductory language

Comment:

This sample expresses the PAS nominee's commitment to taking all actions specified in the agreement. This language is consistent with OGE's guidance on ethics agreements in DAEOgram DO-01-013 (Mar. 28, 2001): "[T]he model agreement does not use any language suggesting that the PAS nominee's commitments might be aspirational, rather than binding. Thus, for example, the various commitments do not use expressions such as 'I will attempt,' 'I will try,' 'I will seek to avoid,' etc., but rather state unequivocally, 'I will,' 'I will not,' or 'I agree to.' It is inconsistent with the very nature of an ethics agreement to suggest that its terms are not binding."

Sample Language:

The purpose of this letter is to describe the steps that I will take to avoid any actual or apparent conflict of interest in the event that I am confirmed for the position of Deputy Administrator of the U.S. Metric Measurements Administration.

1.2.0 – language to include at the end of certain political PAS nominee agreements regarding public posting on OGE's website

Comment:

This sample expresses the PAS nominee's awareness of OGE's policy of posting on its website the ethics agreements of PAS nominees, subject to certain exceptions. This language is not applicable to a special Government employee who is expected to serve 60 days or less in a calendar year or a career Foreign Service Officer who is being nominated to a position as an Ambassador.

Sample Language:

I have been advised that this ethics agreement will be posted publicly, consistent with 5 U.S.C. § 552, on the website of the U.S. Office of Government Ethics with ethics agreements of other Presidential nominees who file public financial disclosure reports.

CHAPTER 2: RECUSALS PURSUANT TO 18 U.S.C. § 208

2.0.0 – 208 recusals: general discussion

Throughout this guide, the sample recusals under 18 U.S.C. § 208 generally include the following phrase: "any particular matter that to my knowledge has a direct and predictable effect." Although the verb in this phrase is "has," agencies may choose instead to write "will have" or "would have" for stylistic reasons. The key is to be consistent in the use of "has," "will have" or "would have" because variations in language may be misconstrued by readers to have meaning. In contrast, the phrase "could have" would be an incorrect substitution for the word "has." The scope of matters covered by the phrase "could have" is broader than the prohibition established in 18 U.S.C. § 208, which does not extend to every particular matter that "could have" a direct and predictable effect on a financial interest.

A number of agency ethics officials prefer to include language addressing the knowledge element. OGE traditionally considered the knowledge element to be implied in ethics agreements. For that reason, in the 2001 model ethics agreement and the original 2008 version of this guide, OGE did not include language addressing the knowledge element in the primary samples of recusals under 18 U.S.C. § 208, though OGE did provide some alternate samples that included such language. Based on feedback from ethics officials and a number of PAS nominees, OGE was persuaded to include language expressly addressing knowledge in the primary samples in the 2014 version of this guide. At the same time, when reading executive branch ethics agreements, readers should not misconstrue any omission of language addressing the knowledge element as signaling that the PAS nominee either has waived the knowledge element or has committed to recuse even when the PAS nominee lacks knowledge of a conflict of interest.

With regard to a conflict of interest arising from a financial interest in an entity (e.g., stock), another feature of these recusals is that they focus on the "financial interests" of the entity. For example, one sample below states that the PAS nominee will not participate in particular matters that have "a direct and predictable effect on the financial interests of Bortot Wilderness, Inc." It does not state that the recusal applies to particular matters that have "a direct and predictable effect on Bortot Wilderness, Inc.," or that have "a direct and predictable effect on my interest in Bortot Wilderness, Inc."

Some of these samples include multiple recusals. Sometimes multiple recusals are necessary because different recusal standards apply at different times. For examples of the use of multiple recusals, see 2.3.2, 3.2.3, 5.2.2, 6.1.0, 7.2.1, and 7.4.1 below. Although multiple recusals are necessary in some cases, they can be redundant in other cases. For example, if a PAS nominee will continue to hold a former employer's stock for the duration of the PAS nominee's appointment, the PAS nominee's ethics agreement will need to include a full recusal under 18 U.S.C. § 208 for all particular matters directly and predictably affecting the financial interests of the former employer. In that case, there may be no need to include an additional "ability or willingness" recusal for any payment the former employer owes the PAS nominee or an additional one-year recusal under 5 C.F.R. § 2635.502.

Finally, note that a waiver under 18 U.S.C. § 208 may be inappropriate in many circumstances in which a particular matter will directly and predictably affect the "ability or willingness" of an entity to honor an obligation to make a payment to a PAS nominee. Whenever samples in this guide contain an "ability or willingness" recusal, the recusal contains language regarding the potential availability of such a waiver. However, agency ethics officials may want to counsel PAS nominees in advance that requests for such waivers may be denied.

2.1.0 – basic 208 recusal

Comment:

Every ethics agreement has a basic criminal conflict of interest recusal stating that the PAS nominee will not participate in any particular matter that has a direct and predictable effect on the PAS nominee's personal and imputed financial interests, absent a waiver or a regulatory exemption. This sample language is flexible in that it applies both to the PAS nominee's current financial interests and to financial interests that the PAS nominee will acquire in the future.

Sample Language:

As required by 18 U.S.C. § 208(a), I will not participate personally and substantially in any particular matter in which I know that I have a financial interest directly and predictably affected by the matter, or in which I know that a person whose interests are imputed to me has a financial interest directly and predictably affected by the matter, unless I first obtain a written waiver, pursuant to 18 U.S.C. § 208(b)(1), or qualify for a regulatory exemption, pursuant to 18 U.S.C. § 208(b)(2). I understand that the interests of the following persons are imputed to me: any spouse or minor child of mine; any general partner of a partnership in which I am a limited or general partner; any organization in which I serve as officer, director, trustee, general partner or employee; and any person or organization with which I am negotiating or have an arrangement concerning prospective employment.

2.2.0 – 208 recusal for specific stocks that pose only a remote risk of a conflict

Comment:

OGE's earlier model ethics agreement supplied sample language for a criminal conflict of interest recusal that identified specific entities in which the PAS nominee has invested. DAEOgram DO-01-013 (Mar. 28, 2001). Sometimes such recusals are helpful because they draw attention to assets that are more likely than other assets to present conflicts of interests. However, a PAS nominee always must be vigilant for potential conflicts with regard to *all* of the PAS nominee's assets. If certain specific assets warrant greater attention than other assets, it may be more prudent for the PAS nominee to divest those assets than for the PAS nominee to recuse.

In some cases, recusals that focus on certain specific assets of PAS nominees have caused confusion. In practice, the determination as to which assets require specific recusals is highly subjective. Moreover, all of a PAS nominee's assets are already covered by the general recusal

under 18 U.S.C. § 208 that appears at the beginning of the ethics agreement. Drawing attention to only certain assets could cause the PAS nominee to neglect the obligation to recuse from particular matters directly and predictably affecting other assets. In addition, listing all of a PAS nominee's assets, or those that do not qualify for a *de minimis* exemption, could create an incorrect impression that the PAS nominee will have to recuse from so many matters that the PAS nominee will be unable to perform the essential functions of the position. Such comprehensive lists also have the disadvantage of establishing a recusal that is based on the present value of the PAS nominee's current assets, ignoring the fact that PAS nominee may buy or sell assets while in Federal service and the fact that the value of assets will fluctuate. For these reasons, ethics agreements usually do not contain recusals for specific assets.

When an ethics agreement does contain a recusal that focuses on a specific asset, there are specific reasons for drawing attention to that asset and for allowing the PAS nominee to continue holding the asset. For example, an agency may recently have concluded its handling of a particular matter affecting a company in which the PAS nominee holds stock. In this hypothetical situation, the following factors might weigh in favor of allowing the PAS nominee to keep the stock: (1) the PAS nominee would have difficulty divesting the stock because, for instance, it is held in a trust for which the PAS nominee is not the trustee; (2) the PAS nominee's recusal will not impede the work of the agency because other officials at the PAS nominee's level will be able to handle matters affecting the company; and (3) there is little likelihood that another particular matter affecting the company will arise during the PAS nominee's anticipated Federal service. In less compelling circumstances, an agency might require the PAS nominee to divest the stock, rather than including a specific recusal in the ethics agreement.

Please note that, in this sample and in 2.2.1, the language carefully states the reason that the agency is allowing the PAS nominee to retain potentially conflicting financial interests.

Sample Language:

I have been advised that the duties of the position of Under Secretary may involve particular matters affecting the financial interests of the following entities: Bennett Financial, LLC; Bortot Wilderness, Inc.; and Molinaro Power Saws, LLC. The agency has determined that it is not necessary at this time for me to divest my interests in these entities because the likelihood that my duties will involve any such matter is remote. Accordingly, with regard to each of these entities, I will not participate personally and substantially in any particular matter that to my knowledge has a direct and predictable effect on the financial interests of the entity for as long as I own it, unless I first obtain a written waiver, pursuant to 18 U.S.C. § 208(b)(1), or qualify for a regulatory exemption, pursuant to 18 U.S.C. § 208(b)(2).

2.2.1 – 208 recusal for specific stocks that pose a likely conflict

Comment:

See the comment to 2.2.0. As is the case in 2.2.0, the language of this sample carefully states the reason that the agency is allowing the PAS nominee to retain potentially conflicting financial interests.

Sample Language:

I have been advised that the duties of the position of Under Secretary may involve particular matters affecting the financial interests of the following entities: Bortot Wilderness, Inc., and Molinaro Power Saws, LLC. The agency has determined that it is not necessary at this time for me to divest my interests in these entities because my recusal from particular matters in which these interests pose a conflict of interest will not substantially limit my ability to perform the essential duties of the position of Under Secretary. Accordingly, for as long as I own these interests, I will not participate personally and substantially in any particular matter that to my knowledge has a direct and predictable effect on the financial interests of either of these entities, unless I first obtain a written waiver, pursuant to 18 U.S.C. § 208(b)(1), or qualify for a regulatory exemption, pursuant to 18 U.S.C. § 208(b)(2).

2.2.2 – 208 recusal for specific bonds that pose only a remote risk of a conflict

Comment:

See the comment to 2.2.0 for a discussion of the reason that specific 208 recusals are disfavored except in limited circumstances. In those limited circumstances in which a specific recusal for bonds is appropriate, a significant feature of the following sample language for bonds is the identification of the interest affected, as follows: "direct and predictable effect on the market value of any of these bonds or on the ability or willingness of the issuers to pay their debt obligations to me."

Sample Language:

I have been advised that the duties of the position of Under Secretary may involve particular matters affecting the following bonds: Bennettsville general obligation bond (6/30/19); Bitlerton water bond (10/31/19); and Bitlerton general obligation bond (3/30/21). The agency has determined that it is not necessary at this time for me to divest these bonds because the likelihood that my duties will involve such a matter is remote. Accordingly, for as long as I own these interests, I will not participate personally and substantially in any particular matter that to my knowledge has a direct and predictable effect on the market value of any of these bonds or on the ability or willingness of the issuers to pay their debt obligations to me, unless I first obtain a written waiver, pursuant to 18 U.S.C. § 208(b)(1), or qualify for a regulatory exemption, pursuant to 18 U.S.C. § 208(b)(2).

2.2.3 – 208 recusal for specific bonds that pose a likely conflict

Comment:

See the comment to 2.2.2.

Sample Language:

I have been advised that the duties of the position of Under Secretary may involve particular matters affecting the following bonds: Bennettsville general obligation bond (6/30/19); Bitlerton water bond (10/31/19); and Bitlerton general obligation bond (3/30/21). The agency has determined that it is not necessary at this time for me to divest these bonds because my recusal from particular matters in which these bonds pose a conflict of interest will not substantially limit my ability to perform the essential duties of the position of Under Secretary. Accordingly, for as long as I own these interests, I will not participate personally and substantially in any particular matter that to my knowledge has a direct and predictable effect on the market value of any of these bonds or on the ability or willingness of the issuers to pay their debt obligations to me, unless I first obtain a written waiver, pursuant to 18 U.S.C. § 208(b)(1), or qualify for a regulatory exemption, pursuant to 18 U.S.C. § 208(b)(2).

2.2.4 – 208 recusal for a promissory note from a company

Comment:

In this sample, the PAS nominee is recused from personal and substantial participation in any particular matter that will directly and predictably affect the "ability or willingness" of the company to repay a promissory note.

Sample Language:

I hold a promissory note from LJ Francis, Inc. For as long as I hold this note, I will not participate personally and substantially in any particular matter that to my knowledge has a direct and predictable effect on the ability or willingness of LJ Francis, Inc., to repay this note, unless I first obtain a written waiver, pursuant to 18 U.S.C. § 208(b)(1).

2.3.0 – 208 recusal for a former employer when retaining employer stock

Comment:

The significant feature of this sample language is the inclusion of a recusal under 18 U.S.C. § 208. As demonstrated in 5.2.0 below, an ethics agreement normally contains a recusal under 5 C.F.R. § 2635.502 when a PAS nominee will have no financial interest in an employer after resignation. However, a recusal under 18 U.S.C. § 208 is necessary if the PAS nominee will retain stock in the employer after resignation. As demonstrated in 3.2.2 below, an ethics agreement should contain two different recusals when a PAS nominee will divest the employer's stock within a year of resignation.

Sample Language:

Upon confirmation, I will resign from my position with Bortot Wilderness, Inc. Because I will continue to own stock in Bortot Wilderness, Inc., I will not participate personally and substantially in any particular matter that to my knowledge has a direct and predictable effect on the financial interests of Bortot Wilderness, Inc., unless I first obtain a written waiver, pursuant to 18 U.S.C. § 208(b)(1), or qualify for a regulatory exemption, pursuant to 18 U.S.C. § 208(b)(2).

2.3.1 – 208 recusal for a former employer when retaining employer stock options

Comment:

See the comment to 2.3.0. If the PAS nominee is divesting the stock options, see 3.2.3 below.

Sample Language:

Upon confirmation, I will resign from my position with Bortot Wilderness, Inc. Because I will continue to hold stock options in Bortot Wilderness, Inc., I will not participate personally and substantially in any particular matter that to my knowledge has a direct and predictable effect on the financial interests of Bortot Wilderness, Inc., unless I first obtain a written waiver, pursuant to 18 U.S.C. § 208(b)(1).

2.3.2 – 208 recusal for a former employer when retaining a financial interest tied to the employer's profits

Comment:

One significant feature of this language is its specificity regarding the details of the payment of a share of profits to the PAS nominee. In this hypothetical situation, the agency was careful to collect these details in order to analyze the appropriateness of this payment under 18 U.S.C. § 209. In connection with this analysis, the agency specifically considered the factors described in OGE's "Summary of the Restriction on Supplementation of Salary," DAEOgram DO-02-016, DO-02-016A (Jul. 1, 2002).

Another significant feature of this language is the differing standards for the PAS nominee's recusal at different times. The highest level of recusal applies during the period in which the amount of the payment can be affected by the employer's earnings. Another level of recusal applies during the period after the amount of the payment has been fixed and before the PAS nominee has received the final installment.

If the PAS nominee had resigned within the past year, the agreement would have contained a third level of recusal. In that event, this sample would have ended with the following sentence: "In addition, for a period of one year after my resignation, I will not participate personally and substantially in any particular matter involving specific parties in

which I know BMBB, Inc., is a party or represents a party, unless I am first authorized to participate, pursuant to 5 C.F.R. § 2635.502(d)."

Note that the date of this agreement is August 1, 2014.

Sample Language:

I resigned from my position with BMBB, Inc., in January 2011. At the time of my resignation, I sold all of my stock in BMBB, Inc., back to the company, and I entered into a separation agreement that provided for BMBB, Inc., to pay me a portion of its profits for four years after my retirement. On April 1, 2012, I received 40 percent of the calendar year 2011 profits; on April 1, 2013, I received 30 percent of the calendar year 2012 profits; on April 1, 2014, I received 20 percent of the calendar year 2013 profits; on April 1, 2015, I will receive 10 percent of the calendar year 2014 profits. Through December 31, 2014, I will not participate personally and substantially in any particular matter that to my knowledge has a direct and predictable effect on the financial interests of BMBB, Inc., unless I first obtain a written waiver, pursuant to 18 U.S.C. § 208(b)(1). Thereafter, until I receive the remaining payment due to me, I will not participate personally and substantially in any particular matter that to my knowledge has a direct and predictable effect on the ability or willingness of BMBB, Inc., to honor its contractual obligation, unless I first obtain a written waiver, pursuant to 18 U.S.C. § 208(b)(1).

2.3.3 – 208 recusal for a former employer when retaining a passive investment interest in a partnership

Comment:

A significant feature of this sample is that it contains language addressing the earned income ban in Executive Order 12674, § 102 (1989), as amended by Executive Order 12731 (1990), which bars full-time Senate-confirmed Presidential appointees from earning any outside income.

In this hypothetical situation, the PAS nominee is resigning from a position with a venture capital firm that holds 10 start-up companies. Although the PAS nominee is resigning from this position, she will continue to be an investor. This sample does not contain a separate recusal under 5 C.F.R. § 2635.502 for clients because the partnership does not represent clients. This sample does include a recusal under 18 U.S.C. § 208 because, as an investor, the PAS nominee will continue to have a financial interest in the partnership.

The agency's ethics officials also will counsel this hypothetical PAS nominee that 18 U.S.C. § 208 imputes to her the interests of the partnership's general partner. In this case, the hypothetical PAS nominee may qualify for the exemption at 5 C.F.R. § 2640.202(f) with regard to the general partner.

Sample Language:

Upon confirmation, I will resign from my position as managing partner of Bennett Venture Capital, LP, and I will become only a limited partner of this entity. During my appointment, I will not manage this entity or provide any other services to it. Instead, I will receive only passive investment income from it. As Under Secretary, I will not participate personally and substantially in any particular matter that to my knowledge has a direct and predictable effect on the financial interests of Bennett Venture Capital, LP, unless I first obtain a written waiver, pursuant to 18 U.S.C. § 208(b)(1).

2.3.4 – 208 recusal for a former employer when retaining a passive membership in a limited liability corporation

Comment:

See the comment to 2.3.3.

Sample Language:

Upon confirmation, I will resign from my position as managing member of Bennett Venture Capital, LLC, and I will become a non-managing member of this entity. During my appointment, I will not manage this entity or provide any other services to it. Instead, I will receive only passive investment income from it. As Under Secretary, I will not participate personally and substantially in any particular matter that to my knowledge has a direct and predictable effect on the financial interests of Bennett Venture Capital, LLC, unless I first obtain a written waiver, pursuant to 18 U.S.C. § 208(b)(1).

2.4.0 – limited 208 recusal related to contractual arrangements

Comment:

The key feature of this sample is its use of the "ability or willingness" standard. In this hypothetical, the agency has confirmed that the PAS nominee no longer holds any Bortot Wilderness, Inc., stock. The agency also has confirmed that the PAS nominee does not provide any services to Bortot Wilderness, Inc. Note that the date of this agreement is February 1, 2015.

Sample Language:

I resigned from my former position with Bortot Wilderness, Inc., in June 2011. At the time of my resignation, I entered into an exit agreement with Bortot Wilderness, Inc., that entitles me to tax preparation services through June 2017. I will not participate personally and substantially in any particular matter that to my knowledge has a direct and predictable effect on the ability or willingness of Bortot Wilderness, Inc., to provide this contractual benefit to me, unless I first obtain a written waiver, pursuant to 18 U.S.C. § 208(b)(1).

2.4.1 – limited 208 recusal related to defined benefit plans

Comment:

As with recusals addressing other contractual arrangements, the key feature of this sample is that it limits the recusal requirement to particular matters affecting the "ability or willingness" to honor contractual obligations. Further guidance relevant to ethics agreements addressing defined benefit pension plans is available in OGE Informal Advisory Memorandum 99 x 6 (Apr. 14, 1999) ("OGE believes that, as a practical matter, most governmental matters in which an employee would participate are unlikely to have a direct and predictable effect on the plan sponsor's ability or willingness to pay the employee's pension."), also published as OGE DAEOgram DO-99-15 (Apr. 14, 1999). Based on the guidance of that informal advisory memorandum, agencies often elect not to address defined benefit pension plans in ethics agreements for PAS nominees. Note that the language of this sample refers to "positions" rather than "position" because, in this hypothetical, the PAS nominee held positions as Vice President and a member of the Board of Directors.

Sample Language:

Upon confirmation, I will resign from my positions with Bortot Wilderness, Inc. Because I will continue to participate in this entity's defined benefit pension plan, I will not participate personally and substantially in any particular matter that to my knowledge has a direct and predictable effect on the ability or willingness of Bortot Wilderness, Inc., to provide this contractual benefit, unless I first obtain a written waiver, pursuant to 18 U.S.C. § 208(b)(1), or qualify for a regulatory exemption, pursuant to 18 U.S.C. § 208(b)(2). For a period of one year after my resignation, I also will not participate personally and substantially in any particular matter involving specific parties in which I know Bortot Wilderness, Inc., is a party or represents a party, unless I am first authorized to participate, pursuant to 5 C.F.R. § 2635.502(d).

2.4.2 – limited 208 recusal related to state or local government defined benefit plans

Comment:

See the comment to 2.4.1 above and 5 C.F.R. § 2640.201(c)(2). For reasons similar to the reasons discussed in 2.4.1 above, agencies usually find it unnecessary to include recusals related to a state's defined benefit pension plan.

Sample Language:

Upon confirmation, I will resign from my position with the Department of Motor Vehicles for the State of Maryland. Following my resignation, I will continue to participate in the State Employees Retirement System of Maryland, a defined benefit pension plan. Because I will continue to participate in this entity's defined benefit plan, I will not participate personally and substantially in any particular matter that to my knowledge has a direct and predictable effect on the ability or willingness of the State of Maryland to provide this contractual benefit to

me, unless I first obtain a written waiver, pursuant to 18 U.S.C. § 208(b)(1), or qualify for a regulatory exemption, pursuant to 18 U.S.C. § 208(b)(2), such as 5 C.F.R. § 2640.201(c)(2).

2.4.3 – limited 208 recusal related to other continuing employee benefits

Comment:

The key feature to this sample is that it limits the recusal requirement to particular matters affecting the "ability or willingness" of the other party to the contract to honor the contractual arrangement. Another feature is a reference to the fact that this hypothetical contractual arrangement is "consistent with the corporation's practice for departing executives," which is relevant to the agency's analysis under 18 U.S.C. § 209. Also, the recusal under 18 U.S.C. § 208 does not mention the availability of regulatory exemptions because there are no applicable exemptions. For reasons similar to those discussed in 2.4.1 above, agencies usually find it unnecessary to include recusals related to routine employee benefits. Note that the language of this sample refers to "positions" rather than "position" because, in this hypothetical, the PAS nominee held positions as Vice President and a member of the Board of Directors.

Sample Language:

Upon confirmation, I will resign from my positions with Bortot Wilderness, Inc. As a retiring executive of Bortot Wilderness, Inc., I am entitled to receive health coverage and life insurance for both me and my spouse for the rest of our lives, consistent with the corporation's practice for departing executives. Therefore, I will not participate personally and substantially in any particular matter that to my knowledge has a direct and predictable effect on the ability or willingness of Bortot Wilderness, Inc., to provide these contractual benefits, unless I first obtain a written waiver, pursuant to 18 U.S.C. § 208(b)(1). For a period of one year after my resignation, I also will not participate personally and substantially in any particular matter involving specific parties in which I know Bortot Wilderness, Inc., is a party or represents a party, unless I am first authorized to participate, pursuant to 5 C.F.R. § 2635.502(d).

CHAPTER 3: DIVESTITURES

3.0.0 – divestitures: general discussion

The deadline for divestiture can be stated in terms of days (e.g., "within 90 days of my confirmation"), or it can be tied to the applicable regulation ("within the time limits established in 5 C.F.R. § 2634.802(b)"). The advantage of tying the deadline to the number of days is that it provides clarity to the PAS nominee and interested parties. The advantage of tying the deadline to the regulation is that, in addition to establishing a deadline, it references the regulation that establishes a procedure for requesting extensions. The samples in this guide tie the deadline to the number of days, but either approach is acceptable.

As noted above in the introduction to this guide, the agency's determination regarding the assets to be divested should take into consideration particular matters of general applicability, not merely particular matters involving specific patters. See OGE DAEOgram, DO-06-029 (Oct. 4, 2006). Thus, for example, a conflicts analysis that focuses only on agency contractors and grant applicants may be insufficient.

Note that these samples employ the word "divest" rather than the word "sell" because the PAS nominee must commit to the divestiture whether or not a "sale" is possible. Although a sale may be the most common means of divestiture, the PAS nominee will need to divest the conflicting asset through one means or another.

Finally, note that these samples use the phrase "my interests." This phrase is intended to cover not only interests that the PAS nominee owns personally but also interests imputed to the PAS nominee because they are held by the PAS nominee's spouse or dependent children. Divestiture by all of these individuals is usually necessary to resolve the PAS nominee's potential conflicts of interest. Capturing both personal and imputed interests with the phrase "my interests" avoids a cumbersome formulation of divestiture language, and there is no need to distinguish between the PAS nominee's interests, the spouse's interests, the dependent child's interests, and jointly held interests. Ethics officials are encouraged to make sure that the PAS nominee understands the scope of this divestiture commitment before the PAS nominee signs the ethics agreement, so that the PAS nominee is not surprised when divestiture of individually and jointly held interests of these family members is later required.

3.1.0 – language regarding Certificates of Divestiture

Comment:

Discussion of Certificates of Divestiture in ethics agreements alerts the PAS nominee of the option to request a Certificate of Divestiture. The PAS nominee must commit unconditionally to divest, whether or not OGE ultimately issues a Certificate of Divestiture. As OGE has explained, an ethics agreement may not make "the divestiture of prohibited or problematic holdings contingent upon receiving a Certificate of Divestiture." DAEOgram DO-01-013 (Mar. 28, 2001), DAEOgram DO-98-013 (Apr. 8, 1998). Note that this sample language usually appears near the end of an ethics agreement, in order to make clear that it refers to all

divestitures discussed in the agreement. There is no need to repeat this language at the end of each separate paragraph in the agreement that discusses divestitures.

Sample Language:

I understand that I may be eligible to request a Certificate of Divestiture for qualifying assets and that a Certificate of Divestiture is effective only if obtained prior to divestiture. Regardless of whether I receive a Certificate of Divestiture, I will ensure that all divestitures discussed in this agreement occur within the agreed upon timeframes and that all proceeds are invested in non-conflicting assets.

3.2.0 – interim 208 recusal pending divestiture of a single asset

Comment:

This language includes the PAS nominee's commitment to recuse from conflicting matters pending divestiture.

Sample Language:

I will divest my interests in Bortot Wilderness, Inc., within 90 days of my confirmation. I will not participate personally and substantially in any particular matter that to my knowledge has a direct and predictable effect on the financial interests of this entity until I have divested it, unless I first obtain a written waiver, pursuant to 18 U.S.C. § 208(b)(1), or qualify for a regulatory exemption, pursuant to 18 U.S.C. § 208(b)(2).

3.2.1 – interim 208 recusal pending divestiture of multiple assets

Comment:

This language includes the PAS nominee's commitment to recuse from conflicting matters pending divestiture. The recusal language has been drafted carefully to require recusal from matters affecting only those assets that the PAS nominee has not yet divested. One common drafting error is to require recusal from matters affecting "these entities" or "any of these entities" until the PAS nominee has completed *all* of the divestitures (e.g., "Until I have completed *these* divestitures, I will not participate personally and substantially in any particular matter that has a direct and predictable effect on the financial interests of *these entities*."). The following sample avoids this drafting error by focusing on "each of these entities" that the PAS nominee has not yet divested. By focusing on the interests of "each of these entities," the language makes clear that the PAS nominee will recuse from a particular matter even if it affects only one of the entities. By focusing on the interest of only those entities that the PAS nominee has *not yet divested*, the language makes clear that the PAS nominee will not need to recuse from a particular matter affecting an entity after the PAS nominee has divested the financial interest in that entity. This clarity is useful because the PAS nominee may complete the various required divestitures on different dates.

Sample Language:

I will divest my interests in the following entities within 90 days of my confirmation: Bortot Wilderness, Inc.; Molinaro Power Saws, LLC; Bennett Worldwide Investigations Co.; and Bitler Environmental Consulting, LP. With regard to each of these entities, I will not participate personally and substantially in any particular matter that to my knowledge has a direct and predictable effect on the financial interests of the entity until I have divested it, unless I first obtain a written waiver, pursuant to 18 U.S.C. § 208(b)(1), or qualify for a regulatory exemption, pursuant to 18 U.S.C. § 208(b)(2).

3.2.2 – interim 208 recusal for a former employer when divesting the employer's stock

Comment:

The significant feature of this sample is the inclusion of two recusals. The subject of multiple recusals is discussed in 2.0.0 above. As demonstrated in 2.3.0 above, an ethics agreement normally contains only the 18 U.S.C. § 208 recusal when a PAS nominee retains a financial interest in a former employer after resignation. As demonstrated in 5.2.0 below, an ethics agreement normally contains only a 5 C.F.R. § 2635.502 recusal for a former employer when a PAS nominee does not retain such a financial interest. This sample, however, contains both recusals because the 18 U.S.C. § 208 recusal will apply only until the PAS nominee divests the employer's stock, while the 5 C.F.R. § 2635.502 recusal will apply for a full year after the PAS nominee's resignation.

Sample Language:

Upon confirmation, I will resign from my position with Bortot Wilderness, Inc. I will divest my stock in Bortot Wilderness, Inc., within 90 days of my confirmation. I will not participate personally and substantially in any particular matter that to my knowledge has a direct and predictable effect on the financial interests of this entity until I have divested it, unless I first obtain a written waiver, pursuant to 18 U.S.C. § 208(b)(1), or qualify for a regulatory exemption, pursuant to 18 U.S.C. § 208(b)(2). For a period of one year after my resignation, I also will not participate personally and substantially in any particular matter involving specific parties in which I know Bortot Wilderness, Inc., is a party or represents a party, unless I am first authorized to participate, pursuant to 5 C.F.R. § 2635.502(d).

3.2.3 – interim 208 recusal for a former employer when divesting the employer's stock options

Comment:

See the comment to 3.2.2. This sample explicitly emphasizes that both steps of the divestiture will occur before the applicable deadline. It also states that divestiture will occur after the PAS nominee's "appointment" because the PAS nominee will not be eligible for a Certificate of Divestiture until the PAS nominee has been appointed. In addition, the recusal language refers to both "stock options and stock," inasmuch as the PAS nominee will acquire

stock by exercising the options. Finally, this sample indicates what will happen to unvested options.

Sample Language:

Upon confirmation, I will resign from my position with Bortot Wilderness, Inc. I will forfeit all Bortot Wilderness, Inc., stock options that are unvested at the time of my resignation. Following my appointment, I will divest my vested stock options and stock in Bortot Wilderness, Inc., within 90 days of my confirmation. If I divest the stock options by exercising them, I will divest the resulting stock within 90 days of my confirmation. I will not participate personally and substantially in any particular matter that to my knowledge has a direct and predictable effect on the financial interests of this entity until I have divested it, unless I first obtain a written waiver, pursuant to 18 U.S.C. § 208(b)(1), or qualify for a regulatory exemption, pursuant to 18 U.S.C. § 208(b)(2). For a period of one year after my resignation, I also will not participate personally and substantially in any particular matter involving specific parties in which I know Bortot Wilderness, Inc., is a party or represents a party, unless I am first authorized to participate, pursuant to 5 C.F.R. § 2635.502(d).

3.2.4 – interim 208 recusal for an investment fund when the fund and a carried interest in the fund are being divested

Comment:

In this sample, the PAS nominee has a financial interest in an investment fund. In addition, he has a carried interest in the fund. The carried interest in this sample is tied to the future profits of the fund. The language of this sample is designed to ensure that there is no confusion on the part of the PAS nominee that the carried interest must be divested.

Sample Language

I am invested in two Conre Capital Partners funds: Conre Capital Fund II, LP and Conre Capital Fund III, LP. Within 90 days of my confirmation, I will divest my interests in Conre Capital Fund II, LP and Conre Capital Fund III, LP, including my carried interests in these funds. With regard to each of these funds, I will not participate personally and substantially in any particular matter in which to my knowledge I have a financial interest, if the particular matter has a direct and predictable effect on the financial interests of the fund or its underlying holdings until I have divested it, unless I first obtain a written waiver, pursuant to 18 U.S.C. § 208(b)(1), or qualify for a regulatory exemption, pursuant to 18 U.S.C. § 208(b)(2).

3.3.0 – divestiture of a prohibited holding

Comment:

This sample illustrates an approach to the divestiture of an asset that is prohibited by a specific statutory or regulatory prohibition, as opposed to a divestiture necessitated by 18 U.S.C. § 208.

Some statutory and regulatory provisions require divestiture of prohibited holdings before the PAS nominee actually assumes the duties of the position; other statutory and regulatory provisions require divestiture within a specified time period. In any case, the ethics agreement needs to be precise about the timing of divestitures of prohibited holdings. In addition, the agency needs to coordinate with OGE in advance to ensure that any request for a Certificate of Divestiture is processed promptly after the PAS nominee is appointed and before the PAS nominee becomes subject to the statutory prohibition. In the example below, the PAS nominee will divest after appointment but before commencing Federal service. However, the language of the agreement should be tailored specifically to address the requirements of any applicable legal authorities.

In some cases, compliance with statutory prohibitions also necessitates coordination with the Office of the Counsel to the President regarding the timing of an appointment, in order to ensure that the PAS nominee has adequate time to effect necessary divestitures before a prohibition becomes applicable to the PAS nominee. See, e.g., 12 U.S.C. §§ 242 ("Each member of the Board shall within fifteen days after notice of appointment make and subscribe to the oath of office"), 244 ("No member . . . shall . . . hold stock in any bank . . . and before entering upon his duties as a member . . . he shall certify under oath that he has complied with this requirement").

For purposes of this sample language, the date of "appointment" is the date on which the President signs the PAS nominee's commission. This date likely will be distinct from the date on which the PAS nominee actually assumes the duties of the Federal position.

Sample Language:

I understand that the Board's supplemental standards of conduct regulations prohibit Board members from holding financial interests in commercial providers of fissible material. 70 C.F.R. § 12901.101(a)(1). I currently hold financial interests in the following prohibited entities: Atomic Bortot, Inc., and Molinaro's Fissible Isotopes, LLC. I will divest these assets after my appointment but before I assume the duties of the position of Board member.

3.4.0 – divestiture due to inability to disclose assets of a non-excepted investment fund that is the subject of a confidentiality agreement

Comment:

A PAS nominee needs to disclose the underlying assets of an investment fund that does not qualify as an excepted investment fund under 5 C.F.R. § 2634.310(c) or § 2634.907(i)(3). However, managers of some private funds do not disclose underlying assets to their investors. To address such cases, OGE has provided guidance regarding the circumstances under which it will certify a PAS nominee's report when the PAS nominee lacks access to information about the holdings of an investment fund. OGE Legal Advisory LA-14-05 (2014). In other circumstances, a PAS nominee will need to include in the ethics agreement a discussion of the planned disposition of the investment fund. The following sample describes a situation in which a PAS nominee has access to information about the underlying holdings of two investment funds but is

unable to disclose that information as a result of having entered into confidentiality agreements prior to being considered for possible nomination to a PAS position. This language does not apply to a PAS nominee for a special Government employee position in which the PAS nominee is expected to serve for no more than 60 days in a calendar year.

Sample Language:

I have disclosed financial interests in Bortot Capital Partners, LP and the Mabry Fund, LP. However, preexisting confidentiality agreements barred me from identifying the underlying assets of these funds in my financial disclosure report. Therefore, I will divest my financial interests in these funds as soon as possible after confirmation and not later than 90 days after my confirmation. With regard to each of these funds, until I have divested the fund, I will not participate personally and substantially in any particular matter that to my knowledge has a direct and predictable effect on the financial interests of that fund or its underlying assets, unless I first obtain a written waiver, pursuant to 18 U.S.C. § 208(b)(1), or qualify for a regulatory exemption, pursuant to 18 U.S.C. § 208(b)(2).

3.5.0 – sale of privately-traded employer stock back to the employer

Comment:

If a PAS nominee must divest the stock of an employer that is a private corporation, the PAS nominee may have to sell the stock back to the employer. If the sale will occur after the PAS nominee enters Federal service, the agency will evaluate the terms of the sale under 18 U.S.C. § 209. The agency will consider the factors discussed in OGE's "Summary of the Restriction on Supplementation of Salary" in connection with 18 U.S.C. § 209. DAEOgram DO-02-016, DO-02-016A (July 1, 2002).

This sample addresses a hypothetical situation in which the sale will occur after the PAS nominee enters Federal service. In this context, the agency's analysis under 18 U.S.C. § 209 noted the fact that the employer has established a price for its stock that is applicable to all of its employees.

If a PAS nominee will sell stock back to an employer before entering Federal service, the sale may constitute an extraordinary payment, depending partly on whether the employer has established a price that is applicable to all employees. In that event, the ethics agreement may need to include a recusal under 5 C.F.R. § 2635.503. Language for such a recusal can be extrapolated from the sample at 6.2.0 below.

Sample Language:

I will divest my shares of private stock in Bortot Wilderness, Inc., within 90 days of my confirmation. Consistent with the company's policy for departing executives, Bortot Wilderness, Inc., will repurchase these shares upon my resignation. Bortot Wilderness, Inc., values its private stock quarterly, and the repurchase price will be based on the most recent quarterly valuation at the time of my resignation. I will not participate personally and substantially in

any particular matter that to my knowledge has a direct and predictable effect on the financial interests of Bortot Wilderness, Inc., until I have divested it, unless I first obtain a written waiver, pursuant to 18 U.S.C. § 208(b)(1).

3.6.0 – interim 208 recusal pending divestiture of a sector mutual fund that does not qualify for the *de minimis* exemption at 5 C.F.R. § 2640.201(b)

Comment:

The PAS nominee in this sample will recuse from conflicting particular matters until he has divested an interest in a sector mutual fund that does not qualify for the *de minimis* exemption at 5 C.F.R. § 2640.201(b). The value of this hypothetical PAS nominee's interest in the sector fund is greater than $50,000.

When using this sample, agency ethics officials may need to caution the PAS nominee that this sample does not address particular matters affecting the fund itself as a legal entity. 5 C.F.R. § 2640.201(d) establishes a limited exemption for "particular matters of general applicability" affecting the fund as a legal entity. However, that exemption does not extend to "particular matters involving specific parties." Pending divestiture of the fund, the PAS nominee may not participate in a particular matter involving specific parties that will have a direct and predictable effect on the fund as a legal entity. This sample does not address that issue because most PAS nominees are unlikely to participate in such party matters. If the PAS nominee's duties will include such party matters, as may be the case for certain PAS nominees to the U.S. Internal Revenue Service or the U.S. Securities and Exchange Commission for example, agency ethics officials may need to incorporate a discussion of 5 C.F.R. § 2640.201(d) in the ethics agreement.

Sample Language:

I will divest my interest in the Marinec Healthcare Fund, within 90 days of my confirmation. Until I have completed this divestiture, I will not participate personally and substantially in any particular matter that to my knowledge has a direct and predictable effect on the financial interests of any holding of the Marinec Healthcare Fund that is invested in the healthcare sector, unless I first obtain a written waiver, pursuant to 18 U.S.C. § 208(b)(1), or qualify for a regulatory exemption, pursuant to 18 U.S.C. § 208(b)(2).

CHAPTER 4: EXEMPTIONS, WAIVERS, AND AUTHORIZATIONS

4.0.0 – exemptions, waivers, and authorizations: general discussion

In certain circumstances, an ethics agreement may need to disclose a PAS nominee's intention to rely on a waiver or an authorization. Some agencies elect to include certain references to specific exemptions in ethics agreements. The following samples provide language for these purposes.

4.1.0 – reliance on *de minimis* exemptions for interests in securities

Comment:

This sample may be useful in an ethics agreement when a PAS nominee is relying on *de minimis* exemptions for specific investments in securities. However, this sample should not be a substitute for individualized training and counseling. Agencies should counsel PAS nominees thoroughly regarding the requirements of *de minimis* exemptions. In particular, agencies should ensure that PAS nominees understand that *de minimis* limits are based on aggregate values, not on the values of individual assets.

Note that this sample does not include a recusal under 18 U.S.C. § 208. This sample assumes that the ethics agreement also contains the standard 18 U.S.C. § 208 recusal in 2.1.0. This sample is intended only to elaborate on the general references to the exemptions that are contained in 2.1.0 (i.e., "unless I . . . qualify for a regulatory exemption, pursuant to 18 U.S.C. § 208(b)(2)"). This sample language is not necessary in every case, but some agencies prefer to use it when a PAS nominee is specifically relying on a *de minimis* exemption for assets that otherwise would present likely conflicts of interest.

Sample Language:

If I rely on a *de minimis* exemption under 5 C.F.R. § 2640.202 with regard to any of my financial interests in securities, I will monitor the value of those interests. If the aggregate value of interests affected by a particular matter increases and exceeds the *de minimis* threshold, I will not participate personally and substantially in the particular matter that to my knowledge has a direct and predictable effect on the interests, unless I first obtain a written waiver pursuant to 18 U.S.C. § 208(b)(1).

4.1.1 – reliance on *de minimis* exemptions for interests in sector mutual funds

Comment:

The sample language in 4.1.0 above addresses reliance on the exemption under 5 C.F.R. § 2640.202 for certain *de minimis* financial interests in securities. The following sample language addresses the exemption for *de minimis* interests in sector mutual funds under 5 C.F.R. § 2640.201(b).

Sample Language:

If I rely on a *de minimis* exemption under 5 C.F.R. § 2640.201(b) with regard to any of my financial interests in sector mutual funds, I will monitor the value of those interests. If the aggregate value of my interests in sector mutual funds that concentrate in any one sector exceeds $50,000, I will not participate personally and substantially in any particular matter that to my knowledge has a direct and predictable effect on the financial interests of any holdings of the funds that are in the specific sector in which the funds concentrate, unless I first obtain a written waiver pursuant to 18 U.S.C. § 208(b)(1), or qualify for a regulatory exemption, pursuant to 18 U.S.C. § 208(b)(2).

4.2.0 – plan to request a waiver pursuant to 18 U.S.C. § 208(b)(1)

Comment:

Executive Order 12674, § 102 (1989), as amended by Executive Order 12731 (1990), requires agencies to consult with OGE when practicable before issuing a waiver pursuant to 18 U.S.C. § 208. With regard to PAS nominees, such consultation is practicable during the review of the PAS nominee's financial disclosure report. Such consultations often will be a necessary condition for OGE's certification of the financial disclosure report of a PAS nominee. Therefore, the agency works with OGE during the certification process to evaluate the appropriateness of issuing a waiver for the interests at issue. As illustrated in the following sample, language in the ethics agreement should place the Senate on notice that a PAS nominee intends to resolve a conflict of interest by seeking a waiver. For additional guidance on waivers, see OGE DAEOgram, DO-07-006 (Feb. 23, 2007).

Sample Language:

I will request a written waiver pursuant to 18 U.S.C. § 208(b)(1) regarding my financial interest in Bortot Wilderness, Inc. Until I have obtained such a waiver, I will not participate personally and substantially in any particular matter that to my knowledge has a direct and predictable effect on the financial interests of this entity.

4.3.0 – plan to request authorization pursuant to 5 C.F.R. § 2635.502(d)

Comment:

As illustrated in the following sample, language in the ethics agreement should place the Senate on notice when a PAS nominee intends to resolve an appearance issue by seeking an authorization pursuant to 5 C.F.R. § 2635.502(d). In any such case, the agency works with OGE during the certification process to evaluate the appropriateness of issuing an authorization pursuant to 5 C.F.R. § 2635.502(d). Such consultation often will be a necessary condition for OGE's certification of the financial disclosure report of a PAS nominee.

Sample Language:

Upon confirmation, I will resign from my position with the Wyoming State Police. For a period of one year after my resignation, I will have a "covered relationship" under 5 C.F.R. § 2635.502 with the Wyoming State Police. Pursuant to 5 C.F.R. § 2635.502(d), I will seek written authorization to participate in particular matters involving specific parties in which the Wyoming State Police is a party or represents a party.

4.3.1 – plan to request authorization pursuant to 5 C.F.R. § 2635.502(d) subject to a limitation

Comment:

See the comment to 4.3.0. As a modification to 4.3.0, the following sample provides a limitation on a PAS nominee's authorization to participate in certain matters in which the PAS nominee previously participated in another capacity outside the Federal Government.

Sample Language:

Upon confirmation, I will resign from my position as Director of the Wyoming State Police. For a period of one year after my resignation, I will have a "covered relationship" under 5 C.F.R. § 2635.502 with the Wyoming State Police. Pursuant to 5 C.F.R. § 2635.502(d), I will seek written authorization to participate in particular matters involving specific parties in which the Wyoming State Police is a party or represents a party. However, during my appointment to the position of Director of the Office of Emergency Coordination of State and Local Law Enforcement, I will not participate personally and substantially in any particular matter involving specific parties in which I previously participated as Director of the Wyoming State Police.

CHAPTER 5: RECUSALS PURSUANT TO 5 C.F.R. § 2635.502

5.0.0 – appearance recusals: general discussion

Most of these samples do not incorporate the "reasonable person" standard contained in 5 C.F.R. § 2635.502. That standard leaves an employee free to determine on a case-by-case basis whether a "reasonable person" with knowledge of the relevant facts would question the employee's impartiality in certain matters. Under 5 C.F.R. § 2635.502(c)(1), the employee loses this discretion when the agency determines that a "reasonable person" with knowledge of the relevant facts would question the employee's impartiality. In the context of a PAS nomination, an agency does not need to make a formal determination that a "reasonable person" actually would question the PAS nominee's impartiality. An ethics agreement may require recusal when there is any concern about the potential for appearance issues to arise in connection with the PAS nominee's participation in certain matters. Inasmuch as PAS nominees are the most senior leaders in the Federal executive branch, their ethics agreements often prospectively address the potential for appearance issues. This approach protects a PAS nominee from the types of questions that would arise if the PAS nominee were to self-regulate on a case-by-case basis.

Most of these samples employ the phrase "pursuant to 5 C.F.R. § 2635.502(d)." The specific reference to 5 C.F.R. § 2635.502(d) is consistent with the omission of any reference to the "reasonable person" standard. It signifies that the PAS nominee will obtain prior written authorization before participating in a covered matter and that the PAS nominee will not rely on an informal determination under 5 C.F.R. § 2635.502(c)(2). Exceptions to this approach are contained in 5.1.0 and 5.2.3 because those samples address circumstances in which there is no particular concern about the potential for appearance issues to arise in connection with the PAS nominee's participation in certain matters.

Absent from these samples is generic language about the purpose of 5 C.F.R. § 2635.502 or about the significance of "covered relationships." As suggested above, the agreement should be a concise statement of relevant commitments. Extraneous information can create ambiguity. Specifically with regard to a recusal under 5 C.F.R. § 2635.502, extraneous information tends to create confusion as to whether the PAS nominee is committing to recuse from certain matters or is committing merely to consider recusal on a case-by-case basis under the "reasonable person" standard. In order to eliminate the potential for such confusion, these samples do not restate or explain the regulatory prohibition.

Another notable feature of the recusals under 5 C.F.R. § 2635.502 in this guide is that they include the phrase "personally and substantially," which does not appear in the regulation. As with recusals under 18 U.S.C. § 208, this language does not significantly limit the PAS nominee's obligation to recuse. At the level of an official whose position requires Senate confirmation, nearly any level of participation would be deemed "personal and substantial" in light of the effect that the official's participation would have on subordinates. Therefore, the primary reason for including the phrase "personally and substantially" in a recusal under 5 C.F.R. § 2635.502 is to avoid creating the misperception that a recusal under 18 U.S.C. § 208 is narrower than a recusal under 5 C.F.R. § 2635.502 with regard to the level of participation it permits. In the past, differences of language between recusals under 5 C.F.R. § 2635.502 that

omitted the phrase "personally and substantially" and recusals under 18 U.S.C. § 208 that included this phrase have led to questions based on such an impression.

The following samples employ the phrase "unless I am first authorized to participate," rather than the phrase "unless I am authorized to participate." The inclusion of the word "first" ensures consistency with the language of the sample recusals under 18 U.S.C. § 208 in this guide (i.e., "unless I first obtain a written waiver, pursuant to 18 U.S.C. § 208(b)(1)"). Omitting the word "first" may create confusion as to whether the timing of an authorization under 5 C.F.R. § 2635.502(d) is different than the timing of a waiver under 18 U.S.C. § 208(b)(1).

Finally, note that, as with recusals under 18 U.S.C. § 208, we have added language addressing the knowledge element. See the discussion of the knowledge element in 2.0.0 above.

5.1.0 – general 2635.502 recusal

Comment:

General recusals under 5 C.F.R. § 2635.502 are disfavored. A general recusal under 5 C.F.R. § 2635.502 effectively means only that the PAS nominee will recuse *if the PAS nominee decides to recuse*. Therefore, it adds little value to an ethics agreement because it does not reflect a specific commitment by the PAS nominee. However, if an agency does elect to include a general recusal under 5 C.F.R. § 2635.502, the agency should be careful to articulate the applicable legal standard correctly. In the following sample, the language correctly articulates this legal standard by requiring the PAS nominee to judge appearances from the perspective of "a reasonable person with knowledge of the relevant facts."

Sample Language:

Finally, I will recuse myself from participation on a case-by-case basis in any particular matter involving specific parties in which I determine that a reasonable person with knowledge of the relevant facts would question my impartiality in that matter, unless I am first authorized to participate, pursuant to 5 C.F.R. part 2635, subpart E.

5.2.0 – one-year 2635.502 recusal for a former employer

Comment:

For party matters involving former employers, the ethics agreement does not, in most cases, leave the question of recusal under 5 C.F.R. § 2635.502 to a PAS nominee's case-by-case determination. Instead, the Government determines prospectively that any such party matter will cause a reasonable person with knowledge of the relevant facts to question the PAS nominee's participation in the matter. For this reason, the following sample states that the PAS nominee will recuse unless the PAS nominee first obtains authorization to participate, and it does not include any reference to "a reasonable person with knowledge of the relevant facts."

Sample Language:

Upon confirmation, I will resign from my position with Bortot Wilderness, Inc. For a period of one year after my resignation, I will not participate personally and substantially in any particular matter involving specific parties in which I know Bortot Wilderness, Inc., is a party or represents a party, unless I am first authorized to participate, pursuant to 5 C.F.R. § 2635.502(d).

5.2.1 – one-year 2635.502 recusal for multiple former employers

Comment:

See the comment to 5.2.0.

Sample Language:

Upon confirmation, I will resign from my positions with the following entities: Bortot Wilderness, Inc.; Molinaro Power Saws, LLC; Bennett Worldwide Investigations Co.; and Bitler Environmental Consulting, LP. For a period of one year after my resignation from each of these entities, I will not participate personally and substantially in any particular matter involving specific parties in which I know that entity is a party or represents a party, unless I am first authorized to participate, pursuant to 5 C.F.R. § 2635.502(d).

5.2.2 – one-year recusal for a former employer in which the PAS nominee has a financial interest

Comment:

When a PAS nominee will retain a financial interest in a former employer, the ethics agreement often includes language addressing only the PAS nominee's obligation under 18 U.S.C. § 208. In most cases, there is no need to include an additional recusal under 5 C.F.R. § 2635.502 because a recusal under 18 U.S.C. § 208 is broader as to the scope of the matters covered than a recusal under 5 C.F.R. § 2635.502. Specifically, a recusal under 18 U.S.C. § 208 covers all particular matters, while a recusal under 5 C.F.R. § 2635.502 covers only a subset of particular matters (i.e., particular matters involving specific parties). Therefore, an agency often can use the language contained in any of the following samples: 2.3.0, 2.3.1, 2.3.2, 2.3.3, or 2.3.4.

In some circumstances, however, an ethics agreement may need to include both a recusal under 18 U.S.C. § 208 and a recusal under 5 C.F.R. § 2635.502. For example, the need for both recusals can arise if the obligation to recuse under 18 U.S.C. § 208 will expire before the obligation to recuse under 5 C.F.R. § 2635.502 will expire. Similarly, the PAS nominee may have an obligation to recuse from certain party matters involving former clients that is not addressed in the recusal under 18 U.S.C. § 208. Therefore, an agency may need to use the language contained in any of the following samples: 3.2.2, 3.2.3, 7.2.1, or 7.4.1.

Sample Language:

Upon confirmation, I will resign from my position with Bortot Wilderness, Inc. Because I will continue to own stock in Bortot Wilderness, Inc., I will not participate personally and substantially in any particular matter that to my knowledge has a direct and predictable effect on the financial interests of Bortot Wilderness, Inc., unless I first obtain a written waiver, pursuant to 18 U.S.C. § 208(b)(1), or qualify for a regulatory exemption, pursuant to 18 U.S.C. § 208(b)(2).

[or]

Upon confirmation, I will resign from my position with Bortot Wilderness, Inc. I will divest my stock in Bortot Wilderness, Inc., within 90 days of my confirmation. I will not participate personally and substantially in any particular matter that to my knowledge has a direct and predictable effect on the financial interests of this entity until I have divested it, unless I first obtain a written waiver, pursuant to 18 U.S.C. § 208(b)(1), or qualify for a regulatory exemption, pursuant to 18 U.S.C. § 208(b)(2). For a period of one year after my resignation, I also will not participate personally and substantially in any particular matter involving specific parties in which I know Bortot Wilderness, Inc., is a party or represents a party, unless I am first authorized to participate, pursuant to 5 C.F.R. § 2635.502(d).

5.2.3 – one-year 2635.502 recusal for an organization with which the PAS nominee has had an unpaid position when the PAS nominee is not closely identified with the organization

Comment:

In most cases, 5.2.0 is the preferred language for recusals under 5 C.F.R. § 2635.502. 5.2.0 omits the "reasonable" person standard because the Government has determined prospectively that recusal is appropriate. The following sample, 5.2.3, differs from 5.2.0 because it includes the "reasonable person" standard. The language of 5.2.3 is not always advisable because including the "reasonable person" standard leaves the question of recusal to the PAS nominee's own case-by-case determination about the appropriateness of participating in party matters involving an entity with which the PAS nominee has a "covered relationship." In some situations, this approach may leave the PAS nominee vulnerable to questions that may arise if the PAS nominee self-authorizes his or her own participation in such matters. Therefore, the language of this sample, 5.2.3, is appropriate only when the totality of the circumstances weighs in favor of permitting the PAS nominee to self-authorize his or her own participation.

The following sample, 5.2.3, addresses a hypothetical situation in which the following circumstances weigh in favor of permitting the hypothetical PAS nominee to self-authorize her participation: (1) the organization was not the PAS nominee's primary employer, (2) the PAS nominee was not in a senior leadership position with the organization and was not a spokesperson for the organization, (3) the PAS nominee is not closely identified with the organization in the minds of members of the public (e.g., as in the case of an organization's founder or a person for whom the organization is named), and (4) the organization's activities are

not closely linked with particular matters involving specific parties in which the PAS nominee is likely to be involved. Based on all of these hypothetical circumstances, this sample, 5.2.3, differs from 5.2.0 in that it leaves the question of recusal under 5 C.F.R. § 2635.502 to the PAS nominee's case-by-case determination under the "reasonable person" standard.

Sample Language:

Upon confirmation, I will resign from my position with the Bitler Foundation. For a period of one year after my resignation, I will not participate personally and substantially in any particular matter involving specific parties in which I know the Bitler Foundation is a party or represents a party if I determine that a reasonable person with knowledge of the relevant facts would question my impartiality in that matter, unless I am first authorized to participate, pursuant to 5 C.F.R. part 2635, subpart E.

5.3.0 – one-year 2635.502 recusal for former clients

Comment:

In the following sample, the PAS nominee will not retain a financial interest in the entity from which the PAS nominee is resigning.

Sample Language:

Upon confirmation, I will resign from my position with Bortot, Molinaro, Bennett and Bitler, LP. For a period of one year after my resignation, I will not participate personally and substantially in any particular matter involving specific parties in which I know this firm is a party or represents a party, unless I am first authorized to participate, pursuant to 5 C.F.R. § 2635.502(d). In addition, I will not participate personally and substantially in any particular matter involving specific parties in which I know a former client of mine is a party or represents a party, for a period of one year after I last provided service to that client, unless I am first authorized to participate, pursuant to 5 C.F.R. § 2635.502(d).

5.4.0 – recusal from particular matters involving specific parties in which the PAS nominee previously participated in connection with the PAS nominee's prior non-Federal employment

Comment:

Sometimes PAS nominees are appointed to positions in which their responsibilities are likely to include matters in which they previously participated before entering Federal service. In such cases, the Government may have concerns about the potential for an appearance that the PAS nominee is "switching sides," especially if the PAS nominee is an attorney, a lobbyist or an employee of an association. Although such concerns do not arise frequently, they do arise from time to time. This sample addresses a hypothetical situation in which such a concern has arisen.

One feature of this sample is that it relies on the process described in 5 C.F.R. § 2635.502(d) for any authorization of participation. This reliance on section 2635.502(d) is appropriate even though section 2635.502 does not explicitly address the appearance of "switching sides." The notice of proposed rulemaking for the Standards of Ethical Conduct for Employees of the Executive Branch explained that section 2635.502 is flexible: "Proposed § 2635.502 . . . provides that an employee should use the process set forth in that section when circumstances other than those specifically described raise questions about his or her impartiality in the performance of official duties." 56 Fed. Reg. 33778, 33786 (1991). Similarly, the notice of final rulemaking explained that section 2635.502(a)(2) is "intended to alert employees to the fact that the covered relationships described in § 2635.502(b)(1) are not the only relationships that can raise appearance issues and to encourage employees to use the process set forth in § 2635.502 to address any circumstances that would raise a question regarding their impartiality." 57 Fed. Reg. 35006, 35026 (1992).

Sample Language:

Upon confirmation, I will resign from my position as General Counsel of the Consumer Defense Fund. For a period of one year after my resignation, I will not participate personally and substantially in any particular matter involving specific parties in which I know the Consumer Defense Fund is a party or represents a party, unless I am first authorized to participate, pursuant to 5 C.F.R. § 2635.502(d). In addition, for the duration of my appointment as General Counsel of the Manufactured Products Administration, I will not participate personally and substantially in any particular matter involving specific parties in which I know I previously participated in my capacity as General Counsel of the Consumer Defense Fund, unless I am first authorized to participate, pursuant to 5 C.F.R. § 2635.502(d).

5.4.1 – recusal from certain particular matters in which the PAS nominee previously participated in connection with the PAS nominee's prior non-Federal employment

Comment:

The recusal in the previous sample, 5.4.0, required the PAS nominee to recuse from "particular matters involving specific parties." The recusal in this sample, 5.4.1, is broader than the recusal in the previous sample, 5.4.0. The recusal in this sample, 5.4.1, requires the PAS nominee to recuse from "particular matters," including both particular matters involving specific parties and particular matters of general applicability. The hypothetical agency officials in this sample elected to require the broad "particular matter" recusal because the activities of the PAS nominee's previous employer are closely related to the mission of the agency.

As a practical matter, this "particular matter" recusal is limited to particular matters in which the PAS nominee previously "appeared before" or "directly communicated with" the agency. This limitation is intended to define the covered particular matters with sufficient clarity to enable agency staff to implement an effective screening arrangement.

Sample Language:

Upon confirmation, I will resign from my position as Director of Government Solutions with the Association of Metric Measurement Device Manufacturers (AMMDM). For a period of one year after my resignation, I will not participate personally and substantially in any particular matter involving specific parties in which I know AMMDM is a party or represents a party, unless I am first authorized to participate, pursuant to 5 C.F.R. § 2635.502(d). In addition, for the duration of my appointment as Deputy Administrator, I will not participate personally and substantially in any particular matter in which I know I previously appeared before, or directly communicated with, the U.S. Metric Standards Administration on behalf of AMMDM, unless I am first authorized to participate, pursuant to 5 C.F.R. § 2635.502(d).

CHAPTER 6: SEVERANCE ARRANGEMENTS

6.0.0 – severance arrangements: general discussion

A reviewer necessarily works closely with a PAS nominee to develop a full factual understanding of the terms of a severance arrangement. In connection with such an arrangement, the PAS nominee's financial disclosure report may need to disclose both a continuing arrangement with an employer and any related financial interests. The ethics agreement carefully addresses the resolution of all conflicts of interest stemming from the severance package. In practice, the reviewer tailors the ethics agreement to the specific facts of the PAS nominee's individual circumstances.

If any severance payment will occur after the PAS nominee begins Federal service, the agency considers the factors discussed in OGE's "Summary of the Restriction on Supplementation of Salary" in connection with 18 U.S.C. § 209. DAEOgram DO-02-016, DO-02-016A (July 1, 2002). If the payment will occur before the PAS nominee begins Federal service, the agency considers the applicability of 5 C.F.R. § 2635.503.

Some of these samples include multiple recusals. They reflect the need for agency ethics officials to define carefully the scope of matters in which PAS nominees will participate after confirmation. Some financial interests require full recusal under 18 U.S.C. § 208 from any particular matter directly and predictably affecting the financial interests of former employers. However, other financial interests require only "ability or willingness" recusals under 18 U.S.C. § 208. In these instances, payments or benefits are not directly tied to earnings or to the value of stock (or other equity issuances). Instead, the commitment is dependent only on the employers' continuing "ability or willingness" to honor their commitments. In other cases, there may be no need for recusals under 18 U.S.C. § 208, but there may be reasons for including recusals under 5 C.F.R. § 2635.502 or 5 C.F.R. § 2635.503. For further discussion regarding the use of multiple recusals, see the comment to 2.0.0 above.

6.1.0 – sample of a complex executive severance and equity package

Comment:

This sample is very fact-specific. Note that the date of this hypothetical agreement is December 3, 2014. This sample is intended to demonstrate the level of specificity with which ethics agreements describe complex severance arrangements. However, the language of an ethics agreement is tailored to the circumstances of an individual PAS nominee. For additional discussion of the language of this sample generally, see the discussion in to 6.0.0 above and comments to 6.3.0 below. For a discussion regarding the use of multiple recusals, see 2.0.0 and 6.0.0 above.

Note that in a case, such as the one in this sample, where a filer is receiving an acceleration in order to resolve a conflict of interest that the government has identified, the PAS nominee or the PAS nominee's outside employer may need to consult a tax professional for advice regarding the acceleration. The U.S. Internal Revenue Service has published regulations

in connection with 26 U.S.C. § 409A regarding certain accelerations of payments under nonqualified deferred compensation plans that may be applicable to certain PAS nominees who have entered into ethics agreements. *See, e.g., 26* C.F.R. § 1.409A-3(j)(4)(iii). OGE takes no position with regard to the applicability of the IRS's regulations to an acceleration.

Sample Language:

Upon confirmation, I will resign from my position with Borlinaro, Inc. Following my resignation, I will receive from Borlinaro, Inc., a severance payment. Borlinaro, Inc., will make this payment to me before I assume the duties of the position of Under Secretary. For a period of two years from the date of this payment, I will not participate personally and substantially in any particular matter involving specific parties in which Borlinaro, Inc., is a party or represents a party, unless I first receive a written waiver pursuant to 5 C.F.R. § 2635.503(c).

Borlinaro, Inc., also will make a payment to me pursuant to a non-compete agreement that I signed when I began working for Borlinaro, Inc., in May 2000. The agreement provides that I will not work for a competitor of Borlinaro, Inc., for one year after a voluntary resignation from the company. Under the agreement, Borlinaro, Inc., has the right to enforce this non-compete clause for a second year, provided that it pays me an amount equivalent to an average of my annual base salary during my final three years of employment. Borlinaro, Inc., has advised me that it will exercise this right to enforce the non-compete clause for a period of two years in exchange for the required payment. Although the agreement provides for this payment to occur at the end of the first year following my resignation, Borlinaro, Inc., will accelerate this payment and will pay it to me before I assume the duties of the position of Under Secretary.

Consistent with the customary practice for departing executives of Borlinaro, Inc., I also am entitled to receive an annual bonus for fiscal year 2014 following my resignation. Borlinaro, Inc., will calculate this bonus using an objective formula that is based solely on the company's earnings for the period from October 1, 2013, through September 30, 2014. If I begin my service as Under Secretary prior to receiving this payment, I will not participate personally and substantially in any particular matter that to my knowledge has a direct and predictable effect on the ability or willingness of Borlinaro, Inc., to make this payment, unless I first obtain a written waiver, pursuant to 18 U.S.C. § 208(b)(1).

If I resign on or before March 30, 2015, I will not receive a bonus for any portion of fiscal year 2015 that I work for Borlinaro, Inc. Consistent with the customary practice for departing executives of Borlinaro, Inc., if I resign after March 30, 2015, I will receive a *pro rata* bonus for 2015. Borlinaro, Inc., will calculate this bonus using an objective formula and will reduce the bonus proportionally to compensate me only for the portion of 2015 during which I will have worked for Borlinaro, Inc. If I begin my service as Under Secretary prior to receiving this payment, I will not participate personally and substantially in any particular matter that to my knowledge has a direct and predictable effect on the ability or willingness of Borlinaro, Inc., to make this payment, unless I first obtain a written waiver, pursuant to 18 U.S.C. § 208(b)(1).

I own shares of Borlinaro, Inc., common stock. I also own vested nonqualified employee stock options and both vested and unvested incentive stock options for shares of Borlinaro, Inc.,

common stock. I do not own any unvested nonqualified employee stock options for shares of Borlinaro, Inc., common stock. Upon my resignation from Borlinaro, Inc., I will forfeit all unvested incentive stock options for shares of Borlinaro, Inc., common stock. Within 90 days of my confirmation, I will divest all of my common stock, all of my vested nonqualified employee stock options, and all of my vested incentive stock options in Borlinaro, Inc. If I divest the stock options by exercising them, I will divest the resulting stock within 90 days of my confirmation. Until I have divested all of these financial interests, I will not participate personally and substantially in any particular matter that to my knowledge has a direct and predictable effect on the financial interests of Borlinaro, Inc., unless I first obtain a written waiver, pursuant to 18 U.S.C. § 208(b)(1), or qualify for a regulatory exemption, pursuant to 18 U.S.C. § 208(b)(2).

Under the Borlinaro Executive Health Plan, my spouse and I will continue to receive free health coverage, consistent with the corporation's practice for departing executives. Borlinaro, Inc., will continue making all payments to the health provider under this plan for as long as either I or my spouse is living. I will not participate personally and substantially in any particular matter that to my knowledge has a direct and predictable effect on the ability or willingness of Borlinaro, Inc., to make these payments, unless I first obtain a written waiver, pursuant to 18 U.S.C. § 208(b)(1).

6.2.0 – extraordinary payment recusal under 5 C.F.R. § 2635.503 that addresses a discretionary severance payment

Comment:

This sample specifies that the employer will make a discretionary severance payment before the PAS nominee begins Federal service. In this hypothetical situation, the reviewer has already confirmed that the employer is capable of making the payment before the PAS nominee's Federal service begins. Given the timing of this payment, the reviewer has analyzed it under 5 C.F.R. § 2635.503. If, instead, the employer were planning to make the payment after the beginning of the PAS nominee's Federal service, the reviewer would have analyzed the payment under 18 U.S.C. § 209. In that event, the reviewer would have considered the factors identified in OGE's "Summary of the Restriction on Supplementation of Salary." DAEOgram DO-02-016, DO-02-016A (Jul. 1, 2002).

Sample Language:

Following my resignation, I will receive a severance payment from Molinaro Power, Inc., before I assume the duties of the position of Under Secretary. For a period of two years after my receipt of this payment, I will not participate personally and substantially in any particular matter involving specific parties in which I know Molinaro Power, Inc., is a party or represents a party, unless I first receive a written waiver pursuant to 5 C.F.R. § 2635.503(c).

6.3.0 – severance payment pursuant to a standard employer policy

Comment:

This sample indicates that a particular payment is being made pursuant to a preexisting agreement and an employer's standard policy. In this hypothetical situation, the agency has confirmed that the partnership makes such payments to all retiring partners. The consistency with which the partnership makes such payments is relevant to the agency's analysis under 18 U.S.C. § 209.

Sample Language:

Upon confirmation, I will retire from my position with Bennett Venture Capital, LP. Pursuant to the Bennett Venture Capital, LP, 1998 Partnership Agreement for Participating Equity Partners, the partnership will pay me a severance payment, in three equal installments, totaling an amount equal to 75 percent of the average of my partnership share for my final three years. Until I have received these payments, I will not participate personally and substantially in any particular matter that to my knowledge has a direct and predictable effect on the ability or willingness of Bennett Venture Capital, LP, to make these payments to me, unless I first obtain a written waiver, pursuant to 18 U.S.C. § 208(b)(1).

6.4.0 – outstanding bonus pursuant to a standard employer policy

Comment:

The date of this sample is January 15, 2015, and the sample addresses the nominee's bonus for 2014. In connection with the agency's evaluation of 18 U.S.C. § 209, the PAS nominee confirmed that the employer routinely pays bonuses to executives after their resignations. The PAS nominee also confirmed that the employer also uses an objective formula to calculate such bonuses. (Specifically, the hypothetical nominee explained to agency officials that the employer assigns differing quantities of "points" to individual executives at the beginning of the year and assigns a dollar-per-point value after calculating its profits following the end of the year. In this hypothetical, the employer eventually assigned a value of $1,250 per point for calendar year 2014, and the nominee's 200 points became worth $250,000.)

If an employer does not use an objective formula, the agency will need to inquire about how the employer determined the amount of the bonus. The agency also will need to evaluate the payment under 18 U.S.C. § 209, using the factors identified in OGE's "Summary of the Restriction on Supplementation of Salary." DAEOgram DO-02-016, DO-02-016A (Jul. 1, 2002).

Finally, note that the recusal in this sample is not the full recusal under 18 U.S.C. § 208. This sample employs the limited "ability or willingness" recusal under 18 U.S.C. § 208 because the amount of the bonus does not depend on the firm's future earnings. As noted above, the date of this agreement is January 15, 2015. The bonus is based on the application of an objective formula to the firm's past earnings during the period between January 1, 2014, and

December 31, 2014. In that sense, the amount of the bonus is fixed, and the only variable is the firm's continued ability or willingness to pay a fixed bonus.

Sample Language:

Following my resignation, I will receive a bonus for calendar year 2014, as is the corporation's practice for departing executives. Borlinaro, Inc., will use an objective formula to calculate this bonus. Until I have received this payment, I will not participate personally and substantially in any particular matter that to my knowledge has a direct and predictable effect on the ability or willingness of Borlinaro, Inc., to make these payments to me, unless I first obtain a written waiver, pursuant to 18 U.S.C. § 208(b)(1).

6.4.1 – outstanding bonus pursuant to a standard employer policy, when the employer will prorate the amount of the bonus

Comment:

The language of this sample is specific about the details of a bonus payment from the PAS nominee's employer. For example, although the date of this sample is hypothetically May 1, 2014, the sample addresses the bonuses for both fiscal year 2014 and fiscal year 2015. It also explains that the payment is consistent with the employer's standard practice, a fact that was relevant to the hypothetical agency's analysis under 18 U.S.C. § 209. In connection with the agency's evaluation of 18 U.S.C. § 209, the agency confirmed that the amount of the payment will be consistent with the amount paid to other executives, including executives who have resigned. See OGE's "Summary of the Restriction on Supplementation of Salary," DAEOgram DO-02-016, DO-02-016A (Jul. 1, 2002).

This sample includes a full recusal under 18 U.S.C. § 208 covering the period of time in which the PAS nominee's bonus is dependent on the company's profits. It includes an "ability or willingness" recusal covering the period of time after which the amount of the PAS nominee's bonus will be fixed and before the PAS nominee receives the bonus. Finally, it includes a one-year recusal for certain party matters under 5 C.F.R. § 2635.502, which may overlap the period in which the other recusals are applicable. When an agreement contains multiple recusals that are applicable at different times in this manner, the reviewer should explain them carefully to the PAS nominee. See 2.0.0 and 6.0.0 above for additional discussion about the use of multiple recusals.

In this hypothetical situation, the employer generates its income by selling power saws only to timber companies. Therefore, the employer's profits are not based on representational activities that may trigger concerns under 18 U.S.C. § 203 or the claims provision of 18 U.S.C. § 205. In some cases, the employer's earnings may trigger such concerns in connection with the PAS nominee's outstanding bonus. When such concerns arise, the agency will need to inquire about the method by which the employer will prorate the bonus. Depending on the factual circumstances, the PAS nominee may be unable to accept a prorated bonus that is based on a percentage of the employer's total earnings for the calendar or fiscal year. Such a bonus may be based partly on the employer's earnings at a time when the PAS nominee is a Federal employee.

In cases in which there are issues under 18 U.S.C. § 203 or 18 U.S.C. § 205, the employer may need to limit the bonus to a share of earnings during the specific period when the PAS nominee was not a Federal employee. For a sample of language addressing such issues, see 7.4.1 below.

Sample Language:

Following my resignation, I will receive a bonus for the work I performed during fiscal year 2014, as is the corporation's practice for departing executive members. Molinaro Power Saws, LLC, will use an objective formula to calculate this bonus. If I am confirmed before the end of the fiscal year on June 30, 2014, Molinaro Power Saws, LLC, will pay me a *pro rata* share of my bonus that covers only the period of fiscal year 2014 prior to my resignation. Through June 30, 2014, I will not participate personally and substantially in any particular matter that to my knowledge has a direct and predictable effect on the financial interests of Molinaro Power Saws, LLC, unless I first obtain a written waiver, pursuant to 18 U.S.C. § 208(b)(1). After June 30, 2014, I will not participate personally and substantially in any particular matter that to my knowledge has a direct and predictable effect on the ability or willingness of Molinaro Power Saws, LLC, to make this payment to me, unless I first obtain a written waiver, pursuant to 18 U.S.C. § 208(b)(1). In addition, for a period of one year after my resignation, I will not participate personally and substantially in any particular matter involving specific parties in which I know Molinaro Power Saws, LLC, is a party or represents a party, unless I am first authorized to participate, pursuant to 5 C.F.R. § 2635.502(d). I will not receive a bonus for fiscal year 2015.

6.4.2 – outstanding bonus is contingent on when the PAS nominee resigns from the employer

Comment

In this sample, the PAS nominee will receive her bonus only if she is still with her employer as of a certain date.

Sample Language

Upon confirmation, I will resign from my position with JB Chayya, Inc. I will receive any 2014 bonus to which I may be entitled only if I am still an employee of JB Chayya, Inc., on March 15, 2015, when such bonuses are paid. I will not receive a 2015 bonus. For a period of one year after my resignation, I will not participate personally and substantially in any particular matter involving specific parties in which I know JB Chayya, Inc., is a party or represents a party, unless I am first authorized to participate, pursuant to 5 C.F.R. § 2635.502(d).

6.4.3 – bonus is not pursuant to a standard policy and will be forfeited if not received prior to appointment

Comment

In the following sample, an employer might pay the PAS nominee a bonus, but payment of such a bonus either is not standard policy for the employer or is discretionary. The PAS nominee has agreed that she will either (1) receive the bonus from her former employer prior to assuming the duties of her Government position or (2) forfeit the bonus if it is not paid before she assumes the duties of her Government position. If the PAS nominee receives the bonus prior to assuming the duties of her Government position, the bonus may constitute an extraordinary payment from a former employer under 5 C.F.R. § 2635.503. In such a case, the PAS nominee would be required to recuse for two years from particular matters involving specific parties in which the former employer is a party or represents a party. On the other hand, if the PAS nominee forfeits the bonus, she will be required to recuse for one year under 5 C.F.R. § 2635.502.

Sample Language:

Upon confirmation, I will resign from my position with the XYZ Corporation. If the XYZ Corporation decides to pay me a bonus for work I performed during 2014, I will not accept the bonus and will forfeit it, unless I receive the bonus before I assume the duties of the position of Under Secretary. If I receive the bonus, I will not participate personally and substantially in any particular matter involving specific parties in which I know the XYZ Corporation is a party or represents a party for a period of two years from the date on which I receive the bonus, unless I first receive a written waiver pursuant to 5 C.F.R. § 2635.503(c). If I do not receive the bonus, I will not participate personally and substantially in any particular matter involving specific parties in which I know the XYZ Corporation is a party or represents a party for a period of one year from the date of my resignation, unless I am first authorized to participate, pursuant to 5 C.F.R. § 2635.502(d).

CHAPTER 7: ATTORNEYS

7.0.0 – attorneys: general discussion

Certain issues arise frequently in connection with the nominations of attorneys who are in private practice. The samples in this section address some of these issues, but they are not intended to be comprehensive.

One key feature of these samples is that they include recusals from both the law firm and from the PAS nominees' own clients. With regard to clients, the recusals under 5 C.F.R. § 2635.502 normally focus on the former clients of the PAS nominee, not the current or former clients of the law firm.

Another feature is that the recusals under 5 C.F.R. § 2635.502 refer to the former clients of PAS nominees only generally (e.g., "any particular matter involving specific parties in which *a former client of mine* is a party or represents a party"). They do not restate the list of clients identified in Schedule D, Part II, of the PAS nominee's financial disclosure report. The generic reference to any "former client" is preferable because the clients identified in Schedule D, Part II, do not include clients who paid $5,000 or less. In addition, Schedule D, Part II, may include clients whom the PAS nominee served more than one year ago.

For similar reasons, the recusals for former clients refer generically to a period of one year from the date on which the PAS nominee "last provided service" to each former client. Consistent with the regulation, the period of recusal is not measured from the date of confirmation or the date of appointment (e.g., "for a period of one year from the date of my confirmation"). Instead, these samples establish a rolling period of recusal that is specific to each client: "I will not participate personally and substantially in any particular matter involving specific parties in which I know a former client of mine is a party or represents a party *for a period of one year after I last provided service to that client*."

When the PAS nominee will be a special Government employee and will continue to work as an equity partner in a law firm, the recusal under 18 U.S.C. § 208 must include all particular matters affecting the financial interests of the law firm. The firm's financial interests include the firm's financial interests in cases involving clients of the firm who are not clients of the PAS nominee. Language addressing this situation is provided in 11.1.1 below (e.g., "I will not participate personally and substantially in any particular matter that has a direct and predictable effect on the financial interests of the firm.").

7.1.0 – resignation from a salaried position with a law firm in which the PAS nominee does not have a financial interest

Comment:

This sample, which involves a salaried attorney, does not contain a recusal under 18 U.S.C. § 208 because the law firm's financial interests will no longer be imputed to the PAS nominee after the PAS nominee's resignation.

Note that the language of this sample is not appropriate in certain circumstances in which 18 U.S.C. § 208 will continue to impute the law firm's financial interests to a PAS nominee following the PAS nominee's resignation, as in 7.6.0 below. In 7.6.0 below, the hypothetical PAS nominee will continue to have an investment in a separate investment partnership in which the law firm is the general partner. Before using the language of the following sample, a reviewer should confirm that the PAS nominee has not invested in a separate partnership in which the law firm is the general partner, which would necessitate the use of the language in 7.6.0 below. The reviewer should also confirm that the PAS nominee does not have a capital account with the firm, which would necessitate the use of the language in 7.2.0, 7.2.1, or 7.2.2 below.

Sample Language:

Upon confirmation, I will resign from my position with the law firm of Bortot, Molinaro, Bennett and Bitler, LP. For a period of one year after my resignation, I will not participate personally and substantially in any particular matter involving specific parties in which I know this firm is a party or represents a party, unless I am first authorized to participate, pursuant to 5 C.F.R. § 2635.502(d). In addition, I will not participate personally and substantially in any particular matter involving specific parties in which I know a former client of mine is a party or represents a party for a period of one year after I last provided service to that client, unless I am first authorized to participate, pursuant to 5 C.F.R. § 2635.502(d).

7.2.0 – the refund of a capital account after resignation will occur before the PAS nominee begins Federal service

Comment:

This sample, which involves a law firm partner, does not contain an "ability or willingness" recusal under 18 U.S.C. § 208, even though the law firm owes the PAS nominee an outstanding payment. The reason that such a recusal is unnecessary is that the payment will occur before the PAS nominee's Federal service begins.

Sample Language:

Upon confirmation, I will resign from my position with the law firm of Bortot, Molinaro, Bennett and Bitler, LP. I currently have a capital account with the firm, and I will receive a refund of that account before I assume the duties of the position of Under Secretary. For a period of one year after my resignation, I will not participate personally and substantially in any particular matter involving specific parties in which I know this firm is a party or represents a party, unless I am first authorized to participate, pursuant to 5 C.F.R. § 2635.502(d). In addition, I will not participate personally and substantially in any particular matter involving specific parties in which I know a former client of mine is a party or represents a party for a period of one year after I last provided service to that client, unless I am first authorized to participate, pursuant to 5 C.F.R. § 2635.502(d).

7.2.1 – the refund of a capital account after resignation may occur after the PAS nominee begins Federal service

Comment:

This sample, which involves a law firm partner, contains an "ability or willingness" recusal under 18 U.S.C. § 208 because the law firm will owe the PAS nominee an outstanding payment after the PAS nominee's Federal service begins.

Sample Language:

Upon confirmation, I will resign from my position with the law firm of Bortot, Molinaro, Bennett and Bitler, LP. I currently have a capital account with the firm, and I will receive a refund of that account after my resignation. Until I have received this refund, I will not participate personally and substantially in any particular matter that to my knowledge has a direct and predictable effect on the ability or willingness of the firm to pay this refund, unless I first obtain a written waiver, pursuant to 18 U.S.C. 208(b)(1). For a period of one year after my resignation, I also will not participate personally and substantially in any particular matter involving specific parties in which I know the firm is a party or represents a party, unless I am first authorized to participate, pursuant to 5 C.F.R. § 2635.502(d). In addition, I will not participate personally and substantially in any particular matter involving specific parties in which I know a former client of mine is a party or represents a party for a period of one year after I last provided service to that client, unless I am first authorized to participate, pursuant to 5 C.F.R. § 2635.502(d).

7.2.2 – a portion of a capital account refund may be withheld by the law firm for account reconciliation and tax payments

Comment:

Similar to sample 7.2.0 above, in this sample, the PAS nominee, who is a law firm partner, will receive a refund of a capital account before the PAS nominee's Federal service begins. However, a portion of the capital account may be withheld by the law firm for account reconciliation and tax payments, with the balance to be refunded after the PAS nominee's Federal service begins. Therefore, the sample contains an "an ability or willingness" recusal under 18 U.S.C § 208 because the law firm will owe the PAS nominee an outstanding payment.

Note that the date of this agreement is July 1, 2014.

Sample Language:

Upon confirmation, I will resign from my position with the law firm of Smith and Jones. I currently have a capital account with the firm, and I will receive a refund of that account before I assume the duties of the position of Director. However, the firm may withhold a portion of my capital account as a reserve for account reconciliations and tax payments that the firm makes on behalf of its partners. I will receive the balance of my capital account no later than January

2015. I will not participate personally and substantially in any particular matter that to my knowledge has a direct and predictable effect on the firm's ability or willingness to pay this refund, unless I first obtain a written waiver, pursuant to 18 U.S.C. §208(b)(1). For a period of one year after my resignation, I will not participate personally and substantially in any particular matter involving specific parties in which I know the firm is a party or represents a party, unless I am first authorized to participate, pursuant to 5 C.F.R. § 2635.502(d). In addition, I will not participate personally and substantially in any particular matter involving specific parties in which I know a former client of mine is a party or represents a party for a period of one year after I last provided service to that client, unless I am first authorized to participate, pursuant to 5 C.F.R. § 2635.502(d).

7.3.0 – the PAS nominee is a sole practitioner who will place the law practice in an inactive status

Comment:

In this sample, the PAS nominee is a sole practitioner who is agreeing to place her practice in an inactive status. Agency ethics officials should counsel a PAS nominee in such a circumstance about the strict requirements of maintaining the practice in an inactive status. The PAS nominee must understand that the PAS nominee's law practice may not perform any business activities, including: taking on new clients, generating income, advertising, engaging in correspondence, and making telephone calls. The only permissible activities involve ministerial duties that do not generate income and are necessary to maintain the legal existence of the business while it is in an inactive status.

Sample Language:

I am the sole proprietor of my law firm, which does business as The Law Firm of Sandi L. Bennett. Upon confirmation, my law firm will cease engaging in any business, including the representation of clients. During my appointment to the position of Assistant Secretary, the law firm will remain dormant and will not advertise. I will not perform any services for the firm, except that I will comply with any requirements involving legal filings, taxes and fees that are necessary to maintain the law firm while it is in an inactive status. As Assistant Secretary, I will not participate personally and substantially in any particular matter that to my knowledge has a direct and predictable effect on the financial interests of The Law Firm of Sandi L. Bennett. In addition, I will not participate personally and substantially in any particular matter involving specific parties in which I know a former client of mine is a party or represents a party for a period of one year after I last provided service to that client, unless I am first authorized to participate, pursuant to 5 C.F.R. § 2635.502(d).

7.3.1 – the PAS nominee is a sole practitioner who will place the law practice in an inactive status and who may receive a referral fee from another attorney

Comment:

See the comment to 7.3.0 for a discussion of placing the law practice in an inactive status. In this variation, the PAS nominee may receive certain referral fees for transferring cases to other attorneys.

Sample Language:

I am the sole proprietor of my law firm, which does business as The Law Firm of Sandi L. Bennett. Upon confirmation, I will cease providing services to my clients and I will refer them to other legal counsel for any ongoing legal matters. I will complete all such referrals before I assume the duties of the position of Assistant Secretary. If I agree to accept any payment for referrals, I will consult your office regarding the applicability of 18 U.S.C. § 209 before I receive any such payment. Upon confirmation, my law firm will cease engaging in any business, including the representation of clients. During my appointment to the position of Assistant Secretary, the law firm will remain dormant and will not advertise. I will not perform any services for the firm, except that I will comply with any requirements involving legal filings, taxes and fees that are necessary to maintain the law firm while it is in an inactive status. As Assistant Secretary, I will not participate personally and substantially in any particular matter that to my knowledge has a direct and predictable effect on the financial interests of The Law Firm of Sandi L. Bennett. In addition, I will not participate personally and substantially in any particular matter involving specific parties in which I know a former client of mine is a party or represents a party for a period of one year after I last provided service to that client, unless I am first authorized to participate, pursuant to 5 C.F.R. § 2635.502(d).

7.4.0 – the PAS nominee will have outstanding accounts receivable after appointment

Comment:

This sample contains an "ability or willingness" recusal under 18 U.S.C. § 208 because the hypothetical PAS nominee's clients will owe outstanding payments after the PAS nominee's Federal service begins. This sample includes language indicating that the PAS nominee and the clients will "fix" any amounts owed before the PAS nominee begins Federal service. The purpose of this language is to prevent a situation in which the PAS nominee might have to negotiate during the PAS nominee's Federal service with former clients over the amounts owed. By resolving potential billing disputes in advance, the PAS nominee eliminates any potential for appearing to misuse the Federal position during subsequent negotiations with a former client.

See the comment to 7.3.0 for a discussion of sole practitioners generally. In addition, see 2.0.0 and 6.0.0 above for a discussion of the use of multiple recusals.

Sample Language:

I am the sole proprietor of my law firm, which does business as The Law Firm of Sandi L. Bennett. Upon confirmation, the law firm will cease engaging in any business, including the representation of clients. During my appointment to the position of Under Secretary, the law firm will remain dormant and will not advertise. I will not perform any services for the firm, except that I will comply with any requirements involving legal filings, taxes and fees that are necessary to maintain the law firm while it is in an inactive status. As Under Secretary, I will not participate personally and substantially in any particular matter that to my knowledge has a direct and predictable effect on the financial interests of The Law Firm of Sandi L. Bennett. All amounts owed to me by any of my clients will be fixed before I assume the duties of the position of Under Secretary, and I will not participate personally and substantially in any particular matter that to my knowledge has a direct and predictable effect on the ability or willingness of any of these clients to pay these amounts. In addition, I will not participate personally and substantially in any particular matter involving specific parties in which I know a former client of mine is a party or represents a party, for a period of one year after I last provided service to that client, unless I am first authorized to participate, pursuant to 5 C.F.R. § 2635.502(d).

7.4.1 – a law firm will owe the PAS nominee an outstanding partnership share after appointment

Comment:

This sample indicates that the PAS nominee will receive a partnership share after withdrawing from a partnership. The language addressing details of this payment is necessarily fact-specific. A reviewer must tailor an agreement's language to the individual circumstances of a particular PAS nominee. When drafting such individualized language, it may be helpful to review 6.0.0 and 6.1.0 above.

Note that the hypothetical date of this agreement is February 1, 2015. The language of this sample specifies that the PAS nominee's prorated partnership share will be based only on the firm's earnings during the period of 2015 prior to the PAS nominee's withdrawal. This sample intentionally establishes that the partnership share will not be based on a portion of the firm's total earnings for the entire year, which could include a period of time when the PAS nominee was a Federal employee.

In this hypothetical situation, the law firm's fiscal year ends on September 30, 2015, but the PAS nominee is likely to be confirmed before that date. (For purposes of this hypothetical situation, one can imagine that the PAS nominee ultimately will be confirmed on June 30, 2015, and will resign from the law firm that same day.) If the PAS nominee were confirmed, for example, on June 30, 2015, the language of this sample would not allow the law firm to prorate the PAS nominee's partnership share by paying 75% of the partnership share that he would have earned if he had resigned after September 30, 2015. Instead, the language of this sample requires the law firm to calculate its actual earnings through June 30, 2015, and to pay the PAS nominee a share of those actual earnings.

If, instead, the ethics agreement allowed the law firm to base the PAS nominee's prorated partnership share on the firm's total earnings for the year, the agency would need to evaluate the payment carefully under 18 U.S.C. § 203 and 18 U.S.C. § 205. The agency might also need to consider the emoluments clause of the United States Constitution. The ethics agreement also would need to contain an appropriate recusal under 18 U.S.C. § 208, as in 6.4.1 above.

The language of this sample indicates that the payment of the partnership share is being made pursuant to a preexisting agreement and an employer's standard policy. It specifically cites the "Bortot, Molinaro, Bennett and Bitler, LP, 1998 Partnership Agreement for Participating Equity Partners." In this hypothetical situation, the agency has confirmed that the firm makes this payment to all retiring equity partners who have signed the 1998 agreement. The consistency with which the firm makes this payment is relevant to the agency's analysis under 18 U.S.C. § 209. See DAEOgram DO-02-016, DO-02-016A (Jul. 1, 2002) ("Summary of the Restriction on Supplementation of Salary").

Note that this sample contains three different recusals. For a discussion about the use of multiple recusals, see 2.0.0 and 6.0.0 above. In addition, note that this sample does not address the refund of a capital account. For language addressing the refund of capital accounts, see 7.2.0, 7.2.1, and 7.2.2 above.

Sample Language:

Upon confirmation, I will withdraw from the partnership of Bortot, Molinaro, Bennett and Bitler, LP. Pursuant to the Bortot, Molinaro, Bennett and Bitler, LP, 1998 Partnership Agreement for Participating Equity Partners, I will receive a *pro rata* partnership share based on the value of my partnership interests for services performed in 2015 through the date of my withdrawal. This payment will be based solely on the firm's earnings through the date of my withdrawal from the partnership. I will not participate personally and substantially in any particular matter that to my knowledge has a direct and predictable effect on the ability or willingness of Bortot, Molinaro, Bennett and Bitler, LP, to pay this *pro rata* partnership share to me, unless I first obtain a written waiver, pursuant to 18 U.S.C. § 208(b)(1). For a period of one year after my resignation, I also will not participate personally and substantially in any particular matter involving specific parties in which I know this firm is a party or represents a party, unless I am first authorized to participate, pursuant to 5 C.F.R. § 2635.502(d). In addition, I will not participate personally and substantially in any particular matter involving specific parties in which I know a former client of mine is a party or represents a party for a period of one year after I last provided service to that client, unless I am first authorized to participate, pursuant to 5 C.F.R. § 2635.502(d).

7.5.0 – the PAS nominee's name appears in the name of the firm

Comment:

The language of this sample indicates that the PAS nominee has complied with 5 C.F.R. § 2636.305 by having his law firm remove his name from the name of the firm. Note that in this sample the hypothetical PAS nominee is "Murray L. Bennett" and he is a named partner of the firm of "Bitler, Bennett, Molinaro & Bortot, LLP."

Sample Language:

I am a partner of the law firm of Bitler, Bennett, Molinaro & Bortot, LLP. Upon confirmation, I will withdraw from the partnership, and the firm will change its name to "Bitler, Molinaro & Bortot, LLP." I currently have a capital account with the firm, and I will receive a refund of that account before I assume the duties of the position of Under Secretary. For a period of one year after my resignation, I will not participate personally and substantially in any particular matter involving specific parties in which I know this firm is a party or represents a party, unless I am first authorized to participate, pursuant to 5 C.F.R. § 2635.502(d). In addition, I will not participate personally and substantially in any particular matter involving specific parties in which I know a former client of mine is a party or represents a party for a period of one year after I last provided service to that client, unless I am first authorized to participate, pursuant to 5 C.F.R. § 2635.502(d).

7.6.0 – the PAS nominee has an equity interest in a partnership created by a law firm

Comment:

In this sample, the PAS nominee has disclosed in the financial disclosure report a financial interest in an investment partnership related to her law firm. The hypothetical investment partnership is named "BMBB Equity Strategies, LP."

In the course of interviewing the PAS nominee about her financial disclosure report, the reviewer uncovered the fact that the law firm is the general partner of BMBB Equity Strategies, LP. Therefore, the law firm's financial interests are imputed to the PAS nominee under 18 U.S.C. § 208, which imputes the interests of a "general partner" to a Federal employee. Although the PAS nominee in this hypothetical situation is resigning from her position as an associate attorney with the law firm, she will retain her interest in BMBB Equity Strategies, LP. Therefore, this sample contains a full recusal under 18 U.S.C. § 208 with regard to the law firm because the law firm's financial interests will continue to be imputed to the PAS nominee following her resignation. Note, however, that a PAS nominee may be able to rely on the exemption for certain interests of general partners in 5 C.F.R. § 2640.202(f).

Sample Language:

Upon confirmation, I will withdraw from the law firm of Bortot, Molinaro, Bennett and Bitler, LP. I will retain my investment in BMBB Equity Strategies, LP, a partnership for which

the law firm is the general partner. For as long as I retain my interest in BMBB Equity Strategies, LP, I will not participate personally and substantially in any particular matter that to my knowledge has a direct and predictable effect on the financial interests of either the law firm or BMBB Equity Strategies, LP, unless I first obtain a written waiver, pursuant to 18 U.S.C. § 208(b)(1), or qualify for a regulatory exemption, pursuant to 18 U.S.C. § 208(b)(2). In addition, I will not participate personally and substantially in any particular matter involving specific parties in which I know a former client of mine is a party or represents a party, for a period of one year after I last provided service to that client, unless I am first authorized to participate, pursuant to 5 C.F.R. § 2635.502(d).

CHAPTER 8: OUTSIDE POSITIONS

8.0.0 – outside positions: general discussion

Ethics agreements typically address a PAS nominee's outside positions. The reviewer should be mindful that a PAS nominee may hold outside positions that the PAS nominee is not required to disclose in the financial disclosure report.

Most of these samples do not identify positions as paid or unpaid. The fact that a position is either paid or unpaid is not necessarily the determining factor with regard to the type of recusal needed. For full-time PAS positions, however, note that Executive Order 12674, § 102 (1989), as amended by Executive Order 12731 (1990), prohibits outside earned income. PAS nominees for full-time positions must terminate any paid outside positions upon confirmation. When drafting an ethics agreement that addresses such a termination, there is no need to provide an explanation that a PAS nominee is terminating a position in order to comply with the earned income ban.

If a PAS nominee is retaining a position for which the PAS nominee is presently receiving compensation, the PAS nominee will need to convert the position to an unpaid position, as illustrated in 8.6.0 below.

8.1.0 – retention of a position as a board member of an organization

Comment:

This sample includes a full recusal under 18 U.S.C. § 208 because the PAS nominee is a "director." This full recusal is necessary whether or not the PAS nominee receives compensation for this position.

Note that the agency has confirmed that this hypothetical PAS nominee is not involved in matters related to the organization's investments. For sample addressing the outside position of a PAS nominee who has been involved in such matters, see 8.1.1 below.

Sample Language:

I will retain my unpaid position as a member of the board of directors of Sister Bitler's Home for the Homeless. I will not participate personally and substantially in any particular matter that to my knowledge has a direct and predictable effect on the financial interests of Sister Bitler's Home for the Homeless, unless I first obtain a written waiver, pursuant to 18 U.S.C. § 208(b)(1), or qualify for a regulatory exemption, pursuant to 18 U.S.C. § 208(b)(2).

8.1.1 – retention of a position as a board member of an organization when the PAS nominee qualifies for the exemption at 5 C.F.R. § 2640.202(e)

Comment:

This sample specifically addresses the exemption at 5 C.F.R. § 2640.202(e). When incorporating language related to this exemption, agency ethics officials should explain the meaning of the concept of "categories" of investments carefully. A PAS nominee will cease to qualify for the exemption if the PAS nominee plays a role in the organization's investments that is more specific than identifying such broad categories as "stocks" generally or "bonds" generally. The PAS nominee may not select specific investments, such as specific stocks or bonds.

In this hypothetical situation, the Office of the Counsel to the President has approved this hypothetical PAS nominee's retention of an outside position. However, the hypothetical PAS nominee has been involved in deliberations related to the organization's investments.

A variation on this sample appears in 8.1.2 below.

Sample Language:

I will retain my unpaid position as a member of the board of directors of Sister Bitler's Home for the Homeless. I will not participate personally and substantially in any particular matter that to my knowledge has a direct and predictable effect on the financial interests of Sister Bitler's Home for the Homeless, unless I first obtain a written waiver, pursuant to 18 U.S.C. § 208(b)(1), or qualify for a regulatory exemption, pursuant to 18 U.S.C. § 208(b)(2). In order to qualify for the exemption at 5 C.F.R. § 2640.202(e) during my government service, I will not play any role in making investment decisions for Sister Bitler's Home for the Homeless, except to the extent that I may participate in decisions to invest in broad categories of investments such as stocks, bonds, or mutual funds.

8.1.2 – retention of a position equivalent to a board member position with a university when the PAS nominee qualifies for the exemption at 5 C.F.R. § 2640.202(e)

Comment:

This sample addresses the same situation addressed in 8.1.1 above. The exemption at 5 C.F.R. § 2640.203(e) is sometimes used in connection with positions PAS nominees hold with universities that are qualifying tax-exempt organizations. In this sample, the hypothetical PAS nominee is on several committees in connection with her outside position, but only one of those committees, the Committee on Finance, is responsible for the university's investments. The PAS nominee will resign from the Committee on Finance and will limit her other board activities in order to ensure that she continues to qualify for the exemption at 5 C.F.R. § 2640.202(e).

Sample Language:

If confirmed, I will retain my position as an unpaid member of the Board of Overseers of Borlinaro University. As part of my role as a member of that board, I serve on the following committees: the Standing Committee on Natural and Applied Sciences, the Visiting Committee on Athletics, and the Committee on Finance. Before assuming the duties of the position of Administrator, I will resign from my membership on the Committee on Finance. As Administrator, I will not participate personally and substantially in any particular matter that to my knowledge has a direct and predictable effect on the financial interests of Borlinaro University, unless I first obtain a written waiver, pursuant to section 208(b)(1), or qualify for a regulatory exemption, pursuant to 18 U.S.C. § 208(b)(2). In order to qualify for the exemption at 5 C.F.R. § 2640.202(e) during my government service, I will not play any role in making investment decisions for Borlinaro University, except to the extent that I may participate in decisions to invest in broad categories of investments such as stocks, bonds, or mutual funds.

8.2.0 – resignation from a position as a board member of an organization

Comment:

Unlike 8.1.0 and 8.1.1 above, this sample does not include a recusal under 18 U.S.C. § 208 because the interests of the organization will not be imputed to the PAS nominee, who is resigning from a board member position. Instead, this sample contains a recusal under 5 C.F.R. § 2635.502. See 5.0.0 and 5.2.0 above for discussion of the language of this type of recusal.

Sample Language:

Upon confirmation, I will resign from my position on the board of directors of Sister Bitler's Home for the Homeless. For a period of one year after my resignation, I will not participate personally and substantially in any particular matter involving specific parties in which I know Sister Bitler's Home for the Homeless is a party or represents a party, unless I am first authorized to participate, pursuant to 5 C.F.R. § 2635.502(d).

8.3.0 – retention of a position as trustee of a trust for the benefit of family members

Comment:

The following sample addresses certain situations in which a PAS nominee is a trustee of a family trust. This language is appropriate if the beneficiaries of the trust are: (1) members of the PAS nominee's immediate family (i.e., the PAS nominee's spouse and the PAS nominee's minor or dependent children); (2) members of the PAS nominee's extended family (e.g., the PAS nominee's brother, the PAS nominee's niece, the PAS nominee's nephew, etc.); or (3) members of both the PAS nominee's immediate family and members of the PAS nominee's extended family.

Sample Language:

I will retain my position as a trustee of the Borlinaro Family Trust. I will not receive any fees for the services that I provide as a trustee during my appointment to the position of Under Secretary. I will not participate personally and substantially in any particular matter that to my knowledge has a direct and predictable effect on the financial interests of the Borlinaro Family Trust, unless I first obtain a written waiver, pursuant to 18 U.S.C. § 208(b)(1), or qualify for a regulatory exemption, pursuant to 18 U.S.C. § 208(b)(2).

8.4.0 – retention of a position as an "active participant" in an organization

Comment:

This sample contains a recusal under 5 C.F.R. § 2635.502(b)(1)(v) because the PAS nominee in this hypothetical situation will continue to serve in an unpaid capacity as an "active participant" in an organization. As demonstrated in 8.4.1 below, this recusal would not be necessary if the PAS nominee were terminating the role of "active participant."

Note that an ethics agreement may contain the language of this sample only when the PAS nominee does not have an imputed financial interest in the organization under 18 U.S.C. § 208. If, for example, the PAS nominee is a "director" or a "trustee," the ethics agreement will need to contain the language of 8.1.0 above.

Sample Language:

I will retain my unpaid position as Chair of the Admissions Committee of the Bennettsville Bar Association. For as long as I retain this position, I will not participate personally and substantially in any particular matter involving specific parties in which I know the Bennettsville Bar Association is a party or represents a party, unless I am first authorized to participate, pursuant to 5 C.F.R. § 2635.502(d).

8.4.1 – resignation from a position as an "active participant" in an organization

Comment:

As in 8.4.0 above, the PAS nominee is serving merely in an unpaid capacity as an "active participant" in an outside organization. In this variation of that hypothetical situation, the PAS nominee is terminating that service. After terminating that service, the PAS nominee will have no continuing recusal obligation. Unlike the recusal obligation under 5 C.F.R. § 2635.502(b)(1)(iv) related to former employers, the recusal obligation under 5 C.F.R. § 2635.502(b)(1)(v) for organizations in which an individual is an "active participant" does not continue for a period of one year after termination. Therefore, the language of this sample does not include a recusal.

As with 8.4.0, note that an ethics agreement may contain the language of this sample only when the PAS nominee does not have an imputed financial interest in the organization under

18 U.S.C. § 208. If, for example, the PAS nominee is a "director" or a "trustee," the ethics agreement will need to contain the language of 8.1.0 above.

Sample Language:

Upon confirmation, I will resign from my position as Chair of the Admissions Committee of the Bennettsville Bar Association.

8.5.0 – leave of absence from an institution of higher learning

Comment:

This sample addresses the exemption related to leaves of absence at 5 C.F.R. § 2640.203(b). The reference to the specific exemption in this sample serves the purpose of defining the limits on the PAS nominee's participation in matters affecting the employing institution.

Sample Language:

Upon confirmation, I will take an unpaid leave of absence from my position as Associate Professor at Borlinaro University. I will not participate personally and substantially in any particular matter that to my knowledge has a direct and predictable effect on the financial interests of Borlinaro University, unless I first obtain a written waiver, pursuant to 18 U.S.C. § 208(b)(1), or qualify for either the exemption at 5 C.F.R. § 2640.203(b) or another regulatory exemption, pursuant to 18 U.S.C. § 208(b)(2).

8.6.0 – changing the terms of a position: converting a paid outside position to a non-paid outside position when a PAS nominee is appointed to a full-time Federal position

Comment:

This sample addresses the earned income ban under Executive Order 12674, § 102 (1989), as amended by Executive Order 12731 (1990), which is applicable to full-time PAS positions. When a PAS nominee is allowed to retain a paid position, the PAS nominee must arrange to convert the position to an unpaid position upon confirmation. As this sample demonstrates, the steps that a PAS nominee must take to achieve such a conversion are fact-specific. A reviewer should ask the PAS nominee to confirm in advance that the outside organization will take all steps necessary to enable the PAS nominee to comply with the ethics agreement. Note that this sample language is not for PAS appointees who will be special Government employees.

For PAS nominees who work for institutions of higher learning, such as the hypothetical PAS nominee in this sample, the exemption at 5 C.F.R. § 2640.203(b) may apply. In that event, the agency can highlight the availability of the exemption by referring to it in the language in the 18 U.S.C. § 208 recusal. Such language appears in the sample below. For PAS nominees who

work for other types of institutions, however, the ethics agreement should omit the reference to 5 C.F.R. § 2640.203(b).

Sample Language:

If confirmed, I will resign from my position as Adjunct Professor with Borlinaro University on December 31, 2014. I am currently teaching one course in the 2014 fall semester at Borlinaro University, and I will continue teaching this course whether I am confirmed before or after the end of the semester. Borlinaro University is currently scheduled to pay me for teaching this course in two equal installments, in mid-October and in mid-December. If I begin my government service prior to receiving one or both of these payments, I will accept compensation only for services rendered before I assume the duties of the position of Assistant Secretary. If I begin my government service after having received one or both of these payments, I will promptly repay any portion that covers the period after I have assumed the duties of the position of Assistant Secretary. Until I resign from my position as Adjunct Professor, I will not participate personally and substantially in any particular matter that to my knowledge has a direct and predictable effect on the financial interests of the Borlinaro University, unless I first obtain a written waiver, pursuant to 18 U.S.C. § 208(b)(1), or qualify for either the exemption at 5 C.F.R. § 2640.203(b) or another regulatory exemption, pursuant to 18 U.S.C. § 208(b)(2). Following my resignation, I will not participate personally and substantially in any particular matter involving specific parties in which I know Borlinaro University is a party or represents a party for a period of one year after my resignation, unless I am first authorized to participate, pursuant to 5 C.F.R. § 2635.502(d).

8.6.1 – changing the terms of a position: retention of a paid executor position

Comment:

See the comment to 8.6.0 above.

Sample Language:

Following my confirmation, I will continue to serve as executor of a family estate. I will not at any time receive compensation for services that I perform during my government appointment. I am currently owed executor fees for services that I have provided to date, and this amount may increase prior to my confirmation. I will accept payment of executor fees earned prior to my confirmation, but the amount of any such fees will be fixed before I assume the duties of the position of Assistant Secretary. Until I have received this payment, I will not participate personally and substantially in any particular matter that to my knowledge has a direct and predictable effect on the ability or willingness of the estate of a family member to provide this payment, unless I first obtain a written waiver, pursuant to 18 U.S.C. § 208(b)(1).

CHAPTER 9: FAMILY FARMS AND FAMILY BUSINESSES

9.0.0 – family farms and family businesses: general discussion

Among other issues, family farms and family businesses often implicate the ban on outside earned income that is established in Executive Order 12674, § 102 (1989), as amended by Executive Order 12731 (1990). A PAS nominee for a full-time Federal position will not be able to continue receiving a salary from an outside entity. For the purposes of this ban, however, earned income is not limited to salaries. A potential issue involving earned income may arise when a PAS nominee provides services that are a material factor in the production of income for a family farm or family business. See 5 C.F.R. §§ 2636.303(b)(4), 2635.804.

Note that the earned income ban under Executive Order 12674, § 102 (1989), as amended by Executive Order 12731 (1990), is applicable only to full-time PAS positions. Therefore, to the extent that the samples in this section address the earned income ban, they are not intended for PAS appointees who will be special Government employees.

9.1.0 – the PAS nominee is retaining a passive ownership interest in a family farm or family business

Comment:

See the discussion in 9.0.0 above. This sample addresses the circumstances of a hypothetical PAS nominee who does not hold a position in the family farm or family business. For language addressing situations in which PAS nominees hold positions in family farms or businesses, see 9.1.1 below.

Sample Language:

My siblings and I own MacDonald Farms, Inc., a closely-held corporation run solely by my brother. I do not hold a position with this entity. I will continue to have a financial interest in this entity, but I will not provide services material to the production of income. Instead, I will receive only passive investment income from it. I will not participate personally and substantially in any particular matter that to my knowledge has a direct and predictable effect on the financial interests of MacDonald Farms, Inc., unless I first obtain a written waiver pursuant to 18 U.S.C. § 208(b)(1).

9.1.1 – the PAS nominee is resigning from a position with a family farm or family business but is retaining a passive financial interest

Comment:

See the discussion in 9.0.0 above.

Sample Language:

My siblings and I own Bitler Farms, Inc. Upon confirmation, I will resign from my position as Secretary of Bitler Farms, Inc. I will continue to have a financial interest in this entity, but I will not provide services material to the production of income. Instead, I will receive only passive investment income from it. I will not participate personally and substantially in any particular matter that to my knowledge has a direct and predictable effect on the financial interests of Bitler Farms, Inc., unless I first obtain a written waiver, pursuant to 18 U.S.C. § 208(b)(1).

9.1.2– the PAS nominee is resigning from a position with a family farm or family business and is divesting a financial interest in the entity

Comment:

See the discussion in 9.0.0 above. In this sample, the hypothetical PAS nominee has a position with a private family business that has no assets and no intrinsic value. Upon her resignation, the PAS nominee will transfer at no cost her financial interest in the entity to her siblings, who are the other owners.

If, instead, a PAS nominee will sell a financial interest to another person, the ethics agreement should substitute the term "sell" for the term "transfer." If the entity is not publicly traded, the reviewer may need to evaluate the payment under 5 C.F.R. § 2635.503 or 18 U.S.C. § 209, depending on the terms of the sale. For a sample involving a hypothetical large, privately traded corporation, see 3.5.0 above.

Sample Language:

My siblings and I own Bitler Farms, Inc. Upon confirmation, I will resign from my position as Secretary of Bitler Farms, Inc. Upon resignation, I will transfer my financial interest in this entity to my siblings. I will not participate personally and substantially in any particular matter involving specific parties in which I know Bitler Farms, Inc., is a party or represents a party, unless I am first authorized to participate, pursuant to 5 C.F.R. § 2635.502(d).

9.2.0 – entity formed to manage the assets of the PAS nominee's family that pays the PAS nominee for services to the entity

Comment:

Issues may arise under the earned income ban when a full-time PAS appointee will be paid for providing services to an entity, even one created for his or her family. See Executive Order 12674, § 102 (1989), as amended by Executive Order 12731 (1990). For this reason, an ethics agreement may need to provide that the PAS nominee will resign from any such outside position. If the PAS nominee does not resign from the position, the agreement should state that the PAS nominee will not earn income for his or her services. In the sample below, the hypothetical PAS nominee earns fees for managing an investment partnership for her large extended family. Note that the earned income ban under Executive Order 12674, § 102 (1989), as amended by Executive Order 12731 (1990), is applicable only to full-time PAS positions. Therefore, the following sample language is not for PAS appointees who will be special Government employees.

Sample Language:

I will retain my position as general partner of The Molinaro Family Partnership, LP. I will receive payment of fees earned prior to my appointment, but I will not at any time receive compensation for services that I perform during my government appointment. I will not participate personally and substantially in any particular matter that to my knowledge has a direct and predictable effect on the financial interests of The Molinaro Family Partnership, LP, or its underlying assets, unless I first obtain a written waiver pursuant to 18 U.S.C. § 208(b)(1).

9.2.1 – entity formed to manage the assets of the PAS nominee's family that does not pay the PAS nominee for services to the entity

Comment:

The language of this sample is useful whenever the PAS nominee has an unpaid position with an entity (e.g., S-corporation, limited liability corporation, partnership, limited liability partnership, etc.) formed to manage only the assets of the PAS nominee's family.

Sample Language:

I will retain my unpaid position as general partner of The Molinaro Family Partnership, LP. I will not at any time receive compensation for services that I perform during my government appointment. I will not participate personally and substantially in any particular matter that to my knowledge has a direct and predictable effect on the financial interests of The Molinaro Family Partnership, LP, or its underlying assets, unless I first obtain a written waiver pursuant to 18 U.S.C. § 208(b)(1).

9.2.2 – the PAS nominee is resigning from a position with an S Corp, but the spouse will continue to be the owner of the business

Comment:

In this sample the PAS nominee will resign from an entity formed to manage the consulting work of the filer and her spouse. In this case, the entity is an S Corp. Because the spouse will retain ownership of the company, the sample language includes an 18 U.S.C. § 208 recusal for the company. The sample also addresses the PAS nominee's clients, as well as the spouse's clients. Finally, the sample includes an agreement that the spouse will not communicate with the PAS nominee's prospective agency on behalf of the business for the duration of the PAS nominee's appointment.

Sample Language:

My spouse and I formed an S Corp doing business as Great Consulting, Inc., to manage our consulting work. Upon confirmation, I will resign from my position with this entity but my spouse will continue to operate it. I will not participate personally and substantially in any particular matter that to my knowledge has a direct and predictable effect on the financial interests of Great Consulting, Inc., unless I first obtain a written waiver, pursuant to 18 U.S.C. § 208(b)(1). All amounts owed to me by my clients will be fixed before I assume the duties of the position of Under Secretary, and I will not participate personally and substantially in any particular matter that has a direct and predictable effect on the ability or willingness of any client to pay the agreed upon amount. In addition, I will not participate personally and substantially in any particular matter involving specific parties in which I know a client of mine is a party or represents a party for a period of one year after I last provided service to that client, unless I am first authorized to participate, pursuant to 5 C.F.R. § 2635.502(d). I also will not participate personally and substantially in any particular matter involving specific parties in which I know a client of my spouse is a party or represents a party, unless I am first authorized to participate, pursuant to 5 C.F.R.§ 2635.502(d). Finally, for the duration of my appointment to the position of Under Secretary, my spouse has agreed not to communicate directly with the Department on behalf of Great Consulting, Inc., or any client.

CHAPTER 10: SPOUSES

10.0.0 – spouse: general discussion

Before drafting an ethics agreement, the reviewer ensures that the PAS nominee's financial disclosure report fully discloses all reportable income and assets of the PAS nominee's spouse. See DAEOgram DO-08-002 (Jan. 25, 2008). For example, the reviewer confirms that the PAS nominee has disclosed all forms of equity interests that a spouse may have in an employer (e.g., restricted stock, stock options, pensions, profit-sharing plans, etc.).

10.1.0 – the employer of the PAS nominee's spouse pays the spouse a fixed salary and bonus tied to the spouse's performance: 2635.502 recusal only

Comment:

In this sample, the hypothetical PAS nominee's spouse has neither an equity interest in, nor a profit-sharing arrangement with, the spouse's employer. Although the spouse receives an annual bonus, the bonus is based on the spouse's performance and not directly on the employer's profits. In this hypothetical situation, there is little likelihood that the hypothetical PAS nominee will be involved in any particular matter affecting the spouse's employer. In addition, there is little likelihood that a particular matter would affect this hypothetical spouse's compensation or employment because the spouse is a clerical employee of a major corporation. Before using the language of this sample, reviewers should also consider 10.1.1 and 10.1.2.

Sample Language:

My spouse is employed by International Hotel Chains, Inc., in a position for which he receives a fixed annual salary and a bonus tied to his performance. For as long as my spouse continues to work for International Hotel Chains, Inc., I will not participate personally and substantially in any particular matter involving specific parties in which I know International Hotel Chains, Inc., is a party or represents a party, unless I am first authorized to participate, pursuant to 5 C.F.R. § 2635.502(d).

10.1.1 – the employer of the PAS nominee's spouse pays the spouse a fixed salary and bonus tied to the spouse's performance: 208 recusal and 2635.502 recusal

Comment:

As with the preceding sample, 10.1.0 above, the hypothetical PAS nominee's spouse in this sample has neither an equity interest in, nor a profit-sharing arrangement with, the spouse's employer. Although the spouse receives an annual bonus, the bonus is based on the spouse's performance and not directly on the employer's profits. In this sample, however, the PAS nominee might participate in particular matters that will have a significant financial impact on the employer of the PAS nominee's spouse. The PAS nominee is being appointed to the U.S. Organ Donation Standards Agency, which has authority to take regulatory action that would restrict or terminate the import activities of the spouse's employer, Trans-Pacific Organ

Transplants, Inc. The restriction or termination of these activities would have such a significant effect on the employment of the PAS nominee's spouse that the spouse would likely lose her job. Therefore, the ethics agreement contains a recusal under 18 U.S.C. § 208.

The 18 U.S.C. § 208 recusal in this sample is narrower than the full recusal under 18 U.S.C. § 208. Rather than focusing on the "financial interests of Trans-Pacific Organ Transplants, Inc.," this language focuses on the "spouse's compensation or employment." Although the PAS nominee's agency, the U.S. Organ Donation Standards Agency, may be involved in particular matters that will affect the financial interests of the spouse's employer, the spouse has neither an equity interest in, nor a profit-sharing arrangement with, the employer. In addition, although this PAS nominee's spouse receives an annual bonus, the bonus is based on the spouse's performance and not directly on the employer's profits.

This sample includes both a recusal under 18 U.S.C. § 208 and a recusal under 5 C.F.R. § 2635.502. The reason for including both recusals is that the recusal under 18 U.S.C. § 208 in this sample is a *limited* recusal. Rather than focusing on the financial interests of the spouse's employer, it focuses only on the spouse's compensation and employment. However, the spouse's compensation and employment might not be affected by a particular matter involving specific parties in which the spouse's employer is a party. As a result, the limited recusal under 18 U.S.C. § 208 would not prevent the PAS nominee from participating in such a party matter. For this reason, the additional recusal under 5 C.F.R. § 2635.502 addresses the Government's concerns about the appearance of the PAS nominee participating in such a party matter.

Although this sample refers to the potential for a waiver under 18 U.S.C. § 208(b)(1) or an authorization under 5 C.F.R. § 2635.502(d), the agency may need to counsel the PAS nominees in advance that a waiver or an authorization likely would be inappropriate in connection with a particular matter that will affect a spouse's compensation or continued employment. In such situations, ethics agreements sometimes omit the language addressing waiver and authorization.

Before using the language of this sample, reviewers should also consider 10.1.0 and 10.1.2.

Sample Language:

My spouse is employed as the Human Resources Director for Trans-Pacific Organ Transplants, Inc., a position for which he receives a fixed annual salary and a bonus tied to his performance. For as long as my spouse works for Trans-Pacific Organ Transplants, Inc., I will not participate personally and substantially in any particular matter that to my knowledge has a direct and predictable effect on my spouse's compensation or employment with Trans-Pacific Organ Transplants, Inc. I also will not participate personally and substantially in any particular matter involving specific parties in which I know Trans-Pacific Organ Transplants, Inc. is a party or represents a party, unless I am first authorized to participate, pursuant to 5 C.F.R. § 2635.502(d).

10.1.2 – the employer of the PAS nominee's spouse pays the spouse a fixed salary, but the ethics agreement addresses appearances regarding the PAS nominee's impartiality: 208 recusal, 2635.502 recusal and additional commitment regarding communications

Comment:

In this sample, the hypothetical PAS nominee's spouse has neither an equity interest in, nor a profit-sharing arrangement with, the employer. The PAS nominee's spouse receives only a salary. Nevertheless, the agency is concerned about the appearance of the PAS nominee's participation in certain matters that involve the PAS nominee's spouse in a professional capacity. In this hypothetical situation, the PAS nominee's agency occasionally receives communications from the spouse's employer. For this reason, the ethics agreement has additional language regarding communications between the PAS nominee's agency and the PAS nominee's spouse. Before using the language of this sample, reviewers should also consider 10.1.0 and 10.1.1.

Sample Language:

My spouse is the President of the International Organ Donation Association (IODA), a position for which he receives a fixed annual salary. For as long as my spouse continues to work for IODA, I will not participate personally and substantially in any particular matter that to my knowledge has a direct and predictable effect on my spouse's compensation or employment with IODA, unless I first obtain a written waiver, pursuant to 18 U.S.C. § 208(b)(1). I also will not participate personally and substantially in any particular matter involving specific parties in which I know IODA is a party or represents a party, unless I am first authorized to participate, pursuant to 5 C.F.R. § 2635.502(d). In addition, my spouse has agreed not to communicate directly with the U.S. Organ Donation Standards Agency on behalf of IODA during my appointment to the position of Deputy Director.

10.2.0 – the PAS nominee's spouse has an equity interest in the employer or has a profit-sharing arrangement with the employer: 208 recusal

Comment:

This sample contains a full recusal under 18 U.S.C. § 208 because the PAS nominee has an imputed financial interest in the spouse's employer as a result of the spouse's equity or profit-based financial interests in the employer.

Sample Language:

My spouse is an employee of Molinaro Power Saws, LLC, and she participates in the employee stock ownership plan. I will not participate personally and substantially in any particular matter that to my knowledge has a direct and predictable effect on the financial interests of Molinaro Power Saws, LLC, unless I first obtain a written waiver, pursuant to 18 U.S.C. § 208(b)(1).

10.3.0 – the PAS nominee's spouse is an attorney whose compensation is not based on the profitability of the spouse's law firm, and the spouse does not have an equity interest in the law firm

Comment:

As with 10.1.2 above, the recusal in this sample focuses on the spouse's "compensation or employment," as opposed to the financial interests of the employer. In this hypothetical situation, the PAS nominee's spouse is an attorney who has neither an equity interest in, nor a profit-sharing arrangement with, the employing law firm. Although the PAS nominee's spouse receives an annual bonus, the bonus is based on the spouse's performance and not directly on the employer's profits. As in the hypothetical situation addressed in 10.1.2, the agency is concerned about the appearance of the PAS nominee's participation in certain matters that involve the PAS nominee's spouse in a professional capacity. Therefore, this sample includes additional language in which the PAS nominee explains that the spouse has agreed not to communicate directly with the agency on behalf of the firm or any client.

Sample Language:

My spouse is employed as an associate by the law firm of Bortot, Molinaro, Bennett and Bitler, LP, from which she receives a fixed salary and an annual bonus tied to her performance. For as long as my spouse continues to work for Bortot, Molinaro, Bennett and Bitler, LP, I will not participate personally and substantially in any particular matter that to my knowledge has a direct and predictable effect on my spouse's compensation or employment with the firm, unless I first obtain a written waiver, pursuant to 18 U.S.C. § 208(b)(1). I also will not participate personally and substantially in any particular matter involving specific parties in which I know my spouse's employer or any client of my spouse is a party or represents a party, unless I am first authorized to participate, pursuant to 5 C.F.R. § 2635.502(d). In addition, for the duration of my appointment to the position of Deputy Director, my spouse has agreed not to communicate directly with the Interstate Waterways Adjudication Agency on behalf of her employer or any client.

10.3.1 – the PAS nominee's spouse is an equity partner with a law firm

Comment:

As a variation on 10.3.0 above, this sample addresses the circumstance in which the spouse has a financial interest in the employer. In this sample, the recusal under 18 U.S.C. § 208 is broader than the two recusals related to the employer in 10.3.0 above.

Sample Language:

My spouse is currently a partner with the law firm of Bortot, Molinaro, Bennett and Bitler, LP. For as long as my spouse continues to work for Bortot, Molinaro, Bennett and Bitler, LP , I will not participate personally and substantially in any particular matter that to my knowledge has a direct and predictable effect on the financial interests of the firm, unless I first

obtain a written waiver, pursuant to 18 U.S.C. § 208(b)(1). I also will not participate personally and substantially in any particular matter involving specific parties in which I know a client of my spouse is a party or represents a party, unless I am first authorized to participate, pursuant to 5 C.F.R. § 2635.502(d). In addition, for the duration of my appointment to the position of Deputy Director, my spouse has agreed not to communicate directly with the Interstate Waterways Adjudication Agency on behalf of her employer or any client.

10.4.0 – the PAS nominee's spouse is a salaried employee of an agency contractor

Comment:

In this sample, the PAS nominee's spouse has no financial interest in the employer beyond a salary and a performance-based bonus. Nevertheless, the agency is concerned about the appearance of the PAS nominee's participation in certain matters that involve the PAS nominee's spouse in a professional capacity.

Sample Language:

My spouse is employed by Bennett & Bitler, LLC, from which he receives a fixed salary and an annual bonus tied to his performance. For as long as my spouse continues to work for Bennett & Bitler, LLC, I will not participate personally and substantially in any particular matter that to my knowledge has a direct and predictable effect on my spouse's compensation or employment with his employer, unless I first obtain a written waiver, pursuant to 18 U.S.C. § 208(b)(1). I also will not participate personally and substantially in any particular matter involving specific parties in which I know my spouse's employer is a party or represents a party, unless I am first authorized to participate, pursuant to 5 C.F.R. § 2635.502(d). For the duration of my appointment as Assistant Administrator, my spouse has agreed not to communicate directly with the U.S. Spatial Relationships Research Administration on behalf of his employer.

CHAPTER 11: SPECIAL GOVERNMENT EMPLOYEES

11.0.0 – special Government employees: general discussion

Agencies should counsel special Government employees thoroughly about the requirements of applicable laws and regulations. These samples are not intended to serve as a substitute for thorough counseling, but they provide useful language for the ethics agreements of special Government employees. Note that the language of 11.1.1 regarding a special Government employee who is an attorney also may be useful for lobbyists and consultants.

11.1.0 – a special Government employee's outside employment

Comment:

A special Government employee has an imputed financial interest in an employer under 18 U.S.C. § 208. This language addresses the availability of waivers only pursuant to 18 U.S.C. § 208(b)(1) because the hypothetical PAS nominee will not be a member of a Federal Advisory Committee Act (FACA) committee. (Note that a special Government employee who is a FACA committee member could also seek a waiver under 18 U.S.C. § 208(b)(3)). In addition, this language addresses the availability of regulatory exemptions under 18 U.S.C. § 208(b)(2). In appropriate circumstances, special Government employees who are employees of institutions of higher learning may be able to rely on 5 C.F.R. § 2640.203(b).

Sample Language:

I am an employee of Bitler-Bennett Overland Transport, Inc. I will not participate personally and substantially in any particular matter that to my knowledge has a direct and predictable effect on the financial interests of Bitler-Bennett Overland Transport, Inc., unless I first obtain a written waiver, pursuant to 18 U.S.C. § 208(b)(1), or qualify for a regulatory exemption, pursuant to 18 U.S.C. § 208(b)(2).

11.1.1 – a special Government employee will continue to practice as an attorney

Comment:

A special Government employee has an imputed financial interest in an employer under 18 U.S.C. § 208. Therefore, this sample includes a full recusal under 18 U.S.C. § 208 because the hypothetical PAS nominee will retain her position with a law firm. This recusal extends to all financial interests of the firm, including the firm's financial interests in cases involving current clients of the firm even if they are not clients of the PAS nominee. However, this sample also includes a recusal under 5 C.F.R. § 2635.502 for clients of the PAS nominee.

The language of this sample addresses the availability of waivers under 18 U.S.C. § 208(b)(1) because the hypothetical PAS nominee will not be a member of a Federal Advisory Committee Act (FACA) committee. (Note that a special Government employee who is a FACA committee member could also seek a waiver under 18 U.S.C. § 208(b)(3)). This language does

not address the availability of regulatory exemptions under 18 U.S.C. § 208(b)(2) because the hypothetical PAS nominee is not an employee of an institution of higher learning and is not able to rely on 5 C.F.R. § 2640.203(b).

Sample Language:

I am an attorney with the law firm of Bitler, Bennett, Molinaro & Bortot, LLP. I will not participate personally and substantially in any particular matter that to my knowledge has a direct and predictable effect on the financial interests of the firm, unless I first obtain a written waiver, pursuant to 18 U.S.C. § 208(b)(1). In addition, I will not participate personally and substantially in any particular matter involving specific parties in which I know a client of mine is a party or represents a party, for a period of one year after I last provided service to that client, unless I am first authorized to participate, pursuant to 5 C.F.R. § 2635.502(d).

11.2.0 – 18 U.S.C. § 203 and 18 U.S.C. § 205: seeking advice in the event that a special Government employee unexpectedly serves more than 60 days in a 365-day period

Comment:

Language in an ethics agreement addressing 18 U.S.C. § 203 and 18 U.S.C. § 205 is generally disfavored. Such language rarely contains a specific commitment by the PAS nominee, and it may not capture all specific requirements of the applicable statutory provisions.

If an agency elects to include language related to these statutory provisions in an ethics agreement, the agency may use the language of the following sample. This sample contains a specific commitment by a hypothetical PAS nominee to keep track of her days of service and to seek advice regarding the additional legal requirements that will apply if her service exceeds 60 days in any period of 365 consecutive days.

Sample Language:

I have been advised that I will likely serve on the board for no more than 60 days in any period of 365 consecutive days. Accordingly, I understand that I may not, under 18 U.S.C. §§ 203(c)(1) and 205(c)(1), provide any representational services or act as agent or attorney for another in any particular matter involving specific parties in which I have participated personally and substantially as a government official. I also understand that I may not receive a share of any payment made for such representational services performed by another. I understand that additional requirements of 18 U.S.C. §§ 203(c)(2) and 205(c)(2) will apply to me if I serve for more than 60 days in any period of 365 consecutive days. In that event, I will comply with all applicable requirements, and I will consult your office if I have any questions about those requirements.

CHAPTER 12: MISCELLANEOUS PROVISIONS

12.0.0 – miscellaneous provisions: general discussion

This guide is not intended to provide an exhaustive list of provisions for ethics agreements of PAS nominees. The samples in this miscellaneous section are provided only as additional illustrations of useful language.

12.1.0 – correcting a PAS nominee's submission to the Senate: correction of the financial disclosure report and submission of a supplemental ethics agreement

Comment:

A PAS nominee's financial disclosure report and ethics agreement should be complete at the time the PAS nominee submits it to the Senate. In the rare case in which a PAS nominee has omitted information inadvertently, the agency needs to coordinate with OGE to supplement the original submission. In addition, the agency's DAEO needs to submit a new opinion letter certifying that there is no unresolved conflict of interest under applicable laws and regulations.

Sample Language:

I am writing to amend the financial disclosure report that I signed on August 1, 2014, and to supplement the ethics agreement that I signed on August 15, 2014.

Enclosed is a new page that I have identified as Page 23a. This new page discloses two financial interests that I inadvertently omitted from Schedule A of my financial disclosure report.

If I am confirmed for the position of Under Secretary, I will divest my interests in Bortot Wilderness, Inc., and Molinaro Power Saws, LLC, within 90 days of my confirmation. With regard to each of these entities, I will not participate personally and substantially in any particular matter that to my knowledge has a direct and predictable effect on the financial interests of the entity until I have divested it, unless I first obtain a written waiver, pursuant to 18 U.S.C. § 208(b)(1), or qualify for a regulatory exemption, pursuant to 18 U.S.C. § 208(b)(2).

12.2.0 – arrangement to write a book in the future

Comment:

This sample provides language for a situation in which a PAS nominee has an arrangement with a publisher, but the PAS nominee has agreed not to work on the textbook during her appointment.

Sample Language:

Before learning of my consideration for a possible nomination to a position at the U.S. Banking Administration, I received an advance from Molinaro Publishers, Inc., for a

textbook on economics that I have agreed to write. I understand that I may not work on this textbook or perform any other services for compensation during my appointment to the position of Deputy Administrator if the Senate confirms my nomination. I will not participate personally and substantially in any particular matter involving specific parties in which I know Molinaro Publishers, Inc., is a party or represents a party, unless I am first authorized to participate, pursuant to 5 C.F.R. § 2635.502(d).

12.2.1 – arrangement with a publisher regarding royalties

Comment:

The following sample applies the "ability or willingness" standard to a publisher's payment of royalties under the terms of a publishing contract with the PAS nominee.

Sample Language:

I receive royalties from Molinaro Publishers, Inc., for sales of my book, *Bortot's Field Guide to Wilderness Survival Techniques*. I will not participate personally and substantially in any particular matter involving specific parties in which I know Molinaro Publishers, Inc., is a party or represents a party, unless I am first authorized to participate, pursuant to 5 C.F.R. § 2635.502(d).

APPENDIX A: LANGUAGE ADDRESSING EXECUTIVE ORDER 13490 (Ethics Pledge)

The following language is used to incorporate the terms of the Ethics Pledge for those PAS nominees required to sign the pledge. This language is not applicable to special Government employees. This language is not applicable to career Foreign Service Officers who are being nominated to Ambassador positions.

A.1.0 – language regarding E.O. 13490 for a new PAS nominee

Comment:

This sample is for use, where applicable, by an individual who is not currently subject to the terms of an Ethics Pledge.

Sample Language:

I understand that as an appointee I am required to sign the Ethics Pledge (Exec. Order No. 13490) and that I will be bound by the requirements and restrictions therein in addition to the commitments I have made in this ethics agreement.

A.1.1 – language regarding E.O. 13490 for a current Presidential appointee who has already signed the Ethics Pledge

Comment:

This sample is for use, where applicable, by an individual who is currently subject to the terms of an Ethics Pledge that the individual previously signed in connection with a Presidential appointment.

Sample Language:

I understand that as an appointee I must continue to abide by the Ethics Pledge (Exec. Order No. 13490) that I previously signed and that I will be bound by the requirements and restrictions therein in addition to the commitments I have made in this ethics agreement.

United States Senate
WASHINGTON, DC 20510

May 29, 2018

The Honorable John Ring
Chairman
National Labor Relations Board
1015 Half Street, S.E.
Washington, D.C. 20570

Dear Chairman Ring:

We write to express strong concerns with your announcement that the National Labor Relations Board ("the Board") may issue a regulation that would undermine labor rights clarified by the Board in its 2015 *Browning-Ferris* decision.[1] This 2015 ruling reaffirmed that, under the National Labor Relations Act (NLRA), corporations with indirect control or reserved authority over workers can be held accountable for violating their rights.[2] Last year, the Board tried to reverse this ruling through a rushed adjudication process, but later vacated the reversal because the Inspector General and the Board's Designated Agency Ethics Official both determined that Member William Emanuel's participation violated federal ethics rules.[3] We are concerned that you will attempt to overturn *Browning-Ferris*–the subject of ongoing litigation in a federal appeals court–by rulemaking, in order to evade the ethical restrictions that apply to adjudications.

The trust that the public places in the Board's impartiality has been substantially tarnished over the past year, largely due to the Board's rushed reversals of several significant precedents churned out without public notice or input in the week prior to the expiration of former-Chairman Miscimarra's term.[4] The *Hy-Brand* decision—intended to overturn the joint-employer standard that the Board articulated in *Browning-Ferris*—was vacated after the Board's Inspector General determined that there was a "serious and flagrant problem and/or deficiency in the

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[1] *See Browning-Ferris Industries*, 362 NLRB No. 186 (Aug. 27, 2015).
[2] *Id.*
[3] *See Hy-Brand Industrial Contractors*, 366 NLRB No. 26 (Feb. 26, 2018); *Hy-Brand Industrial Contractors*, 365 NLRB No. 156 (Dec. 14, 2017); National Labor Relations Board, Office of Inspector General, "Notification of a Serious and Flagrant Problem and/or Deficiency in the Board's Administration of its Deliberative Process and the National Labor Relations Act with Respect to the Deliberation of a Particular Matter," February 9, 2018, *available at* https://www.nlrb.gov/sites/default/files/attachments/basic-page/node-1535/OIG%20Report%20Regarding%20Hy_Brand%20Deliberations.pdf; Bloomberg BNA, ""Appointee Violated Trump Ethics Pledge, Second Official Says," Hassan A. Kanu, April 26, 2018, https://www.bna.com/appointee-violated-trump-n57982091556/.
[4] *See UPMC*, 365 NLRB No. 153 (Dec. 11, 2017); *Hy-Brand Industrial Contractors*, 365 NLRB No. 156 (Dec. 14, 2017); *The Boeing Company*, 365 NLRB No. 154 (Dec. 14, 2017); *PCC Structurals*, 365 NLRB No. 160 (Dec. 15, 2017); *Raytheon Network Centric Systems*, 365 NLRB No. 161 (Dec. 15, 2017).

Board's administration of its deliberative process"—specifically, that Board Member William Emanuel's participation tainted the resulting decision because his former employer represents a party in *Browning-Ferris*.[5] The Board's designated agency ethics official agreed with the Inspector General that Emanuel violated federal ethics rules.[6]

Since these revelations, you and the Board's other members have expressed interest in rectifying the Board's ethical lapses. In their unanimous decision to vacate the Board's decision to overrule *Browning-Ferris*, then-Chairman Marvin Kaplan and Members Mark Gaston Pearce and Lauren McFerran expressly pointed to the Inspector General's determination that Emanuel should have recused himself but did not.[7] And when asked about the importance of observing ethics requirements that prevent Board members from participating in matters that affect former employers and clients during your confirmation hearing, you affirmatively stated, "I take this issue very seriously," and "I don't want to be in the situation Member Emanuel is in and I don't want to put another cloud over the NLRB."[8]

Yet, now you are proposing that the Board change the joint-employer standard by employing the rulemaking process. While there is nothing inherently suspect about an agency proceeding by rulemaking, it is impossible to ignore the timing of this announcement, which comes just a few months after the Board tried and failed to overturn *Browning-Ferris*, and appears designed to evade the ethical constraints that federal law imposes on Members in adjudications. The Board's sudden announcement of rulemaking on the exact same topic suggests that it is driven to obtain the same outcome sought by Member Emanuel's former employer and its clients, which the Board failed to secure by adjudication.

Further, your public statements indicate that you have prejudged this issue. In the announcement that the Board is considering this rulemaking, you said that "the current uncertainty over the standard to be applied in determining joint-employer status under the Act undermines employers' willingness to create jobs and expand business opportunities."[9] You tweeted that "uncertainty over the standard undermines job creation & economic expansion"[10] Given that federal law prohibits the Board from engaging in economic analysis, these statements must reflect either 1) anecdotal characterizations of current law not rooted in empirical analysis or a solicitation of input from the full range of stakeholders (as the Board failed to solicit amicus briefs before considering *Hy-Brand*), or 2) analysis conducted in violation of federal law.[11]

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[5] *See* "Notification of a Serious and Flagrant Problem and/or Deficiency in the Board's Administration of its Deliberative Process and the National Labor Relations Act with Respect to the Deliberation of a Particular Matter," *supra* note 3.
[6] *See* Kanu, *supra* note 3.
[7] *See* Hy-Brand, 366 NLRB No. 26 (Feb. 26, 2018).
[8] Bloomberg BNA, "Labor Nominee John Ring Makes Ethics Promises," Hassan A. Kanu, May 14, 2018, https://www.bna.com/labor-board-nominee-n57982089396/.
[9] National Labor Relations Board, "NLRB Considering Rulemaking to Address Joint-Employer Standard," press release, May 9, 2018, https://www.nlrb.gov/news-outreach/news-story/nlrb-considering-rulemaking-address-joint-employer-standard.
[10] Tweet by John F. Ring, May 9, 2018, https://twitter.com/NLRBChairman/status/994287315509022720.
[11] *See* 29 U.S.C. § 154(a).

You also stated that the Board majority "intends to get the job done."[12] This of course presumes that there is a "job" to be "done," i.e., that current law is deficient in some way and must be changed. This alone demonstrates that you have prejudged the issue. Further, the "uncertainty" rationale may be easily dismissed as pretextual. If the Board were to promulgate a regulation changing the joint-employer standard, it would be the third time the standard has changed during this Administration. A rulemaking would take years and lead to further legal action, which is certain to *prolong* uncertainty.

While it is hard to see how such an action could reduce uncertainty, it is very easy to understand how it appeases corporate interests desperately seeking to escape liability under *Browning-Ferris* and suppress their workers' efforts to organize. It is obvious to all rational observers that it is the *substance* of the Board's current standard—not any "uncertainty" about what it means—that troubles the new Board majority. Reinstating the tainted *Hy-Brand* standard through rulemaking would sweep significant conflict-of-interest concerns raised by multiple independent, non-partisan officials under the rug and further damage the Board's reputation. We therefore urge you to reconsider this decision and refrain from initiating a rulemaking process on the joint-employer standard.

Sincerely,

Elizabeth Warren
United States Senator

Kirsten Gillibrand
United States Senator

Bernard Sanders
United States Senator

[12] *See* Tweet by John F. Ring, *supra* note 10.

UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD
Washington, D.C. 20570

June 5, 2018

The Honorable Elizabeth Warren
U.S. Senate
317 Hart Senate Office Building
Washington, DC 20510

The Honorable Kirsten Gillibrand
U.S. Senate
478 Russell Senate Office Building
Washington, DC 20510

The Honorable Bernard Sanders
U.S. Senate
332 Dirksen Senate Office Building
Washington, DC 20510

Dear Senators Warren, Gillibrand, and Sanders:

I write in response to your letter dated May 29, 2018, in which you express strong concerns over the National Labor Relations Board's announcement regarding joint-employer rulemaking. I appreciate the concerns raised in your letter, and I welcome this opportunity to respond to them.

At the outset, let me assure you that any notice-and-comment rulemaking undertaken by the NLRB will never be for the purpose of evading ethical restrictions. As you note, I said during my confirmation hearing that I would take my ethical obligations very seriously, and I do. Additionally, as NLRB Chairman, I view it as my responsibility to ensure the Agency upholds the highest ethical standards in everything we do. To that end, we will be announcing in the near future a comprehensive internal ethics and recusal review to ensure that the Agency has appropriate policies and procedures in place to ensure full compliance with all ethical obligations and recusal requirements.

Your letter references that the NLRB may engage in rulemaking on the joint-employer subject. Candor requires me to inform you that the NLRB is no longer merely considering joint-employer rulemaking. A majority of the Board is committed to engage in rulemaking, and the NLRB will do so. Internal preparations are underway, and we are working toward issuance of a Notice of Proposed Rulemaking (NPRM) as soon as possible, but certainly by this summer.

As I stated in the NLRB's May 9, 2018 press release, a majority of the Board believes that "notice-and-comment rulemaking offers the best vehicle to fully consider all views on what the [joint-employer] standard ought to be." Although we could have invited briefing in connection with our traditional case-by-case adjudication, rulemaking on this topic opens an avenue of communication with the Board for – we hope – thousands of commenters. I look forward to hearing from all interested parties, including individuals and small businesses that may not be able to afford to hire a law firm to write a brief for them, yet have valuable insight to share from hard-won experience.

Rulemaking is appropriate for the joint-employer subject because it will permit the Board to consider and address the issues in a comprehensive manner and to provide the greatest guidance. Although legal standards of general applicability can be announced in a decision of a specific case, case decisions are often limited to their facts. With rulemaking, by contrast, the Board will be able to consider and apply whatever standard it ultimately adopts to selected factual scenarios in the final rule itself. In this way, rulemaking on the joint-employer standard will enable the Board to provide unions and employers greater "certainty beforehand as to when [they] may proceed to reach decisions without fear of later evaluations labeling [their] conduct an unfair labor practice," as the Supreme Court has instructed us to do.[1]

In addition, whereas standards adopted through case adjudication may apply either retroactively or prospectively, final rules issued through notice-and-comment rulemaking are required by law to apply prospectively only. Thus, by establishing the standard for determining joint-employer status through rulemaking, the Board immediately frees its stakeholders from any concern that actions they take today may wind up being evaluated under a new legal standard announced months or years from now.

I should note as well that this prospective application of rulemaking also should eliminate any concerns about ethical restrictions or recusals with respect to pending cases. Because any rule developed will apply prospectively only, its application will not affect any case pending before the Board or one of its regional offices on the effective date of the final rule, and thus it will not affect any parties to pending cases.

Finally, I want to address your concerns that there has been any prejudgment of the joint-employer issue. Contrary to what your letter declares my public statements "must reflect," my reference to "the current uncertainty" in my public statements regarding the joint-employer standard reflects fact. The standard for determining joint-employer status under the NLRA has been and continues to be a hotly debated subject, as everyone in the labor-law community is acutely aware. Additionally, regardless of your position on the standard it announced, the 2015 *Browning-Ferris* decision[2] left employers and unions almost completely in the dark so far as predicting outcomes in specific cases and planning accordingly is concerned, as the *Browning-Ferris* majority candidly acknowledged.[3] Whatever standard the Board ultimately adopts at the

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[1] *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 679 (1981).

[2] *Browning-Ferris Industries of California, Inc., d/b/a BFI Newby Island Recyclery*, 362 NLRB No. 186 (2015) ("*Browning-Ferris*").

[3] See id., slip op. at 16: "[W]e do not and cannot attempt today to articulate every fact and circumstance that could define the contours of a joint employment relationship. Issues related to the nature and extent of a putative joint-employer's control over particular terms and conditions of employment will undoubtedly arise in future cases—just as they do under the current test—and those issues are best examined and resolved in the context of specific factual circumstances." As stated above, rulemaking will enable the Board to address "specific factual circumstances" hypothetically and thus to furnish unions and employers the guidance that *Browning-Ferris* conspicuously failed to provide.

conclusion of the rulemaking process, my hope is that the final rule will bring far greater certainty and stability to this key area of labor law, consistent with congressional intent.[4]

Likewise, my statement that the Board "intends to get the job done" does not "presume[]" any particular outcome, as your letter suggests. It shows only that the Board is determined—after gathering and considering input from all interested parties—to provide clear and useful guidance to its stakeholders regarding "the contours of a joint employment relationship,"[5] which many believe *Browning-Ferris* expressly left undefined. I trust these explanations put to rest any claim that my previous public statements demonstrate prejudgment on my part.

Although I have an open mind and will consider all comments we receive from interested parties, I will not pretend that I am devoid of opinions on the subject of the joint-employer standard, any more than my predecessors, then-Chairman Wilma Liebman and then-Members Mark Gaston Pearce and Craig Becker, were devoid of opinions when they embarked on rulemaking to change the Board's representation-case procedures in 2011, or than then-Chairman Mark Gaston Pearce and then-Members Kent Hirozawa and Nancy Schiffer were when they repeated that enterprise in 2014. As I am sure you are aware, it is well settled that holding opinions or embarking on notice-and-comment rulemaking does not disqualify an agency administrator from undertaking such rulemaking. Indeed, the Court of Appeals for the District of Columbia Circuit has observed that "to disqualify administrators because of opinions they expressed or developed" would mean that "'experience acquired from their work would be a handicap instead of an advantage.'"[6] It "would eviscerate the proper evolution of policymaking were [a court] to disqualify every administrator who has opinions on the correct course of his agency's future actions."[7] For these reasons, the D.C. Circuit has held that "an individual should be disqualified from rulemaking only when there has been a clear and convincing showing" that the agency official "has an unalterably closed mind on matters critical to the disposition of the proceeding."[8] I assure you, Senators, that absolutely is not the case with me.

Sincerely,

John F. Ring
Chairman

[4] See *Colgate-Palmolive-Peet Co. v. NLRB*, 338 U.S. 355, 362-63 (1949) ("To achieve stability of labor relations was the primary objective of Congress in enacting the National Labor Relations Act.").

[5] *Browning-Ferris*, above, slip op. at 16.

[6] *United Steelworkers of America v. Marshall,* 647 F.2d 1189, 1209 (D.C. Cir. 1980) (quoting *FTC v. Cement Institute*, 333 U.S. 683, 702-703 (1948)).

[7] *Air Transport Association of America, Inc. v. NMB*, 663 F.3d 476, 488 (D.C. Cir. 2011).

[8] Id. at 487.

From:	Gavin Young
To:	Committee on Adjudication (Gov)
Subject:	ACUS Committee on Adjudication: Recusal Rules - Proposed Recommendations
Date:	Wednesday, November 7, 2018 6:44:44 PM
Attachments:	image001.png Recusal Rules Recommendations 11-6-18 Post-Committee Approval.pdf

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Dear Members of the Committee on Adjudication and Interested Persons:

Attached, please find the proposed recommendation for Recusal Rules for Administrative Adjudicators which was approved by the Committee after consideration at yesterday's meeting. It has also been posted on the project page.

Many thanks for your participation and hard work on this project. The Proposed Recommendation will be considered at ACUS' 70th Plenary Session (December 13 – 14).

Please reply to me at gyoung@acus.gov if you have any questions, and thank you again for your service to the Administrative Conference.

Regards,

Gavin Young | Counsel for Congressional Affairs
cid:image001.png@01D38973.B4086610

1120 20th Street, NW Suite 706 South . Washington, DC . 20036
(202) 480-2080 (tel.) . (202) 386-7190 (f)
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ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Recusal Rules for Administrative Adjudicators

Committee on Adjudication

Proposed Recommendation from Committee on Adjudication | November 6, 2018

Recusal, the voluntary or involuntary withdrawal of an adjudicator from a particular proceeding, is an important tool for maintaining the integrity of adjudication. Recusal serves two important purposes. First, it helps ensure that parties to an adjudicative proceeding have their claims resolved by an impartial decisionmaker. This aspect of recusal is reflected in the Due Process Clause as well as statutory, regulatory, and other sources of recusal standards. Second, the recusal of adjudicators who may appear partial helps inspire public confidence in adjudication in ways that a narrow focus on actual bias against the parties themselves cannot.[1] Appearance-based recusal standards are in general not constitutionally required, but have been codified in judicial recusal statutes as well as model codes.[2] Unlike with federal judicial recusal, there is no uniformity regarding how agencies approach appearance-based recusal in the context of administrative adjudication.

In Recommendation 2016-4, *Evidentiary Hearings Not Required by the Administrative Procedure Act*, the Conference recommended that agencies require adjudicator recusal in the case of actual bias.[3] This recommendation builds upon Recommendation 2016-4 by addressing the need for agency-specific recusal rules that consider the full range of actual and apparent bias.

---

[1] Louis J. Virelli, III, Recusal Rules for Administrative Adjudicators (October 29, 2018) (report to the Admin. Conf. of the U.S.), https://www.acus.gov/report/second-draft-report-recusal-rules-administrative-adjudicators.

[2] *See* 28 U.S.C. § 455(a); MODEL CODE OF JUDICIAL CONDUCT FOR FEDERAL ADMINISTRATIVE LAW JUDGES Canon 3(C) (AM. BAR ASS'N 1989), *available at* http://digitalcommons.pepperdine.edu/cgi/viewcontent.cgi?article=1521&context=naalj. Both require recusal by federal judges where their "impartiality might reasonably be questioned."

[3] Admin. Conf. of the U.S., Recommendation 2016-4, *Evidentiary Hearings Not Required by the Administrative Procedure Act*, 81 Fed. Reg. 94,314 (Dec. 23, 2016).

It focuses on a variety of agency adjudications, including those governed by the adjudication provisions of the Administrative Procedure Act (APA), as well as adjudications not governed by the APA but nonetheless consisting of evidentiary hearings required by statute, regulation, or executive order.[4] It also covers appeals from those adjudications. This Recommendation does not, however, necessarily apply to adjudications conducted by agency heads, as there are additional considerations associated with their role as chief policy makers for their agencies.

Recusal rules addressing actual and apparent bias can protect parties and promote public confidence in agency adjudication without compromising the agency's ability to fulfill its mission effectively and efficiently. This necessarily lends itself to standards that are designed in accord with the specific needs and structure of each agency and that allow for fact-specific determinations regarding the appearance of adjudicator impartiality. This contextualized nature of administrative recusal standards is reflected in the list of relevant factors in Paragraph 3 for agencies to consider in fashioning their own recusal rules. The parenthetical explanations accompanying these factors show how different features of an agency's administrative scheme may affect the stringency of those rules.

Recusal rules also provide a process for parties to petition their adjudicator to recuse in the event he or she does not elect to do so sua sponte. This right of petition promotes more informed and accountable recusal decisions. Recusal rules can further provide for appeal of those decisions within the agency. Such appeals are typically performed by other agency adjudicators acting in an appellate capacity but may also include the official responsible for the adjudicator's work assignments. This right of appeal increases the reliability and accuracy of recusal determinations and helps ensure the consistency and effectiveness of the work assignment process. Consistent with the APA, adjudicators, including appellate reviewers, must

[4] In the context of Recommendation 2016-4 and the associated consultant report, adjudications with evidentiary hearings governed by the APA adjudication sections (5 U.S.C. §§ 554, 556, and 557) and adjudications that are not so governed but that otherwise involve a legally required hearing have been named, respectively, "Type A" and "Type B" adjudications. This Recommendation includes both Type A and Type B adjudications but does not apply to adjudications that do not involve a legally required evidentiary hearing (known as "Type C" adjudications). *See* Admin. Conf. of the U.S., Recommendation 2016-4, *Evidentiary Hearings Not Required by the Administrative Procedure Act*, 81 Fed. Reg. 94,314 (Dec. 23, 2016); Michael Asimow, Evidentiary Hearings Outside the Administrative Procedure Act 2 (November 10, 2016) (report to the Admin. Conf. of the U.S.), https://www.acus.gov/report/evidentiary-hearings-outside-administrative-procedure-act-final-report.

provide parties with a written explanation of their recusal decisions.[5] Finally, agencies could provide for the publication of recusal determinations. Both written explanations and publication of recusal decisions increase transparency and thus the appearance of impartiality.

It is important to distinguish agency-specific recusal rules from the ethics rules promulgated by the Office of Government Ethics (OGE).[6] As an initial matter, the two are not mutually exclusive. Even where ethical and recusal rules overlap, it is entirely possible and coherent to enforce both. This is due, at least in part, to the differences in scope, form, and enforcement mechanisms between the two. Ethics rules focus on preventing conflicts of interest among all executive branch employees. Recusal rules focus on ensuring the integrity and perceived integrity of adjudicative proceedings. Recusal rules are thus broader in focus and narrower in application than ethics rules. In this light, ethics rules tend to be very precise, as agency employees need clear guidance to ensure that they behave ethically. Recusal rules, by contrast, tend to be much more open-ended and standard-like. They are focused on maintaining both actual impartiality and the appearance of impartiality of adjudicative proceedings, which may be compromised by conduct that would not constitute a breach of any ethics rule, such as advocating a particular policy in a speech before a professional association. The enforcement mechanism is also different. A potential ethics issue is reviewed privately inside the agency, whereas the recusal process is public and can be initiated by a party to the adjudication if an adjudicator does not recuse him or herself sua sponte.

Under current law, an agency that wishes to supplement its ethics rules must, of course, do so through the OGE supplemental process.[7] Under that process, agencies, with the concurrence of OGE, may enact ethics rules that supplement existing OGE rules. This recommendation, in contrast, focuses exclusively on a set of recusal rules an agency may wish to adopt to preserve the integrity and perceived integrity of its adjudicative proceedings.

[5] 5 U.S.C. § 555(e).
[6] The Ethics in Government Act of 1978 (P.L. 95-521) established the Office of Government Ethics to provide "overall direction of executive branch policies related to preventing conflicts of interest on the part of officers and employees of any executive agency." OGE's *Standards of Ethical Conduct for Employees of the Executive Branch* are available at 5 C.F.R. Part 2635.
[7] *See* Standards of Ethical Conduct for Employees of the Executive Branch, 5 C.F.R. § 2635.105.

RECOMMENDATION

1. Agencies should adopt rules for recusing adjudicators who preside over adjudications governed by the adjudication sections of the Administrative Procedure Act (APA) as well as those not governed by the APA but administered by federal agencies through evidentiary hearings required by statute, regulation, or executive order. The recusal rules should also apply to adjudicators who conduct internal agency appellate review of decisions from those hearings, but not necessarily to agency heads. When adopting such rules, agencies should consider the actual and perceived integrity of agency adjudications and the effectiveness and efficiency of adjudicative proceedings.
2. Agency rules should, consistent with ACUS Recommendation 2016-4, provide for the recusal of adjudicators in cases of actual adjudicator partiality, referred to as bias in ACUS Recommendation 2016-4, including:
    a. Improper financial or other personal interest in the decision;
    b. Personal animus against a party or group to which that party belongs; or
    c. Prejudgment of the adjudicative facts at issue in the proceeding.
3. Agency recusal rules should preserve the appearance of impartiality among its adjudicators. Such rules should be tailored to accommodate the specific features of an agency's adjudicative proceedings and its institutional needs, including consideration of the following factors:
    a. The regularity of the agency's appearance as a party in proceedings before the adjudicator (the more frequently an adjudicator must decide issues in which his or her employing agency is a party, the more attentive the agency should be in ensuring that its adjudicators appear impartial);
    b. Whether or not the hearing is part of enforcement proceedings (an agency's interest in the outcome of enforcement proceedings could raise public skepticism about adjudicators' ability to remain impartial and thus require stronger appearance-based recusal standards);
    c. The agency's adjudicative caseload volume and capacity, including the number of other adjudicators readily available to replace a recused adjudicator (if recusal

could realistically infringe upon an agency's ability to adjudicate by depriving it of necessary adjudicators, then more flexible appearance-based recusal standards may be necessary);

d. Whether a single adjudicator renders a decision in proceedings, or whether multiple adjudicators render a decision as a whole (concerns about quorum, the administrative complications of tied votes, and preserving the deliberative nature of multi-member bodies may counsel in favor of more flexible appearance-based recusal standards); and

e. Whether the adjudicator acts in a reviewing/appellate capacity (limitations on appellate standards of review could reduce the need for strict appearance-based recusal standards, but the greater authority of the reviewer could warrant stronger appearance-based recusal standards).

4. Agency recusal rules should also include procedural provisions for agencies to follow in determining when recusal is appropriate. At a minimum, those provisions should include the right of petition for parties seeking recusal, initial determination by the presiding adjudicator, and internal agency appeal.

5. In response to a recusal petition, adjudicators and appellate reviewers of recusal decisions should provide written explanations of their recusal decisions. In addition, agencies should publish their recusal decisions to the extent practicable and consistent with appropriate safeguards to protect relevant privacy interests implicated by the disclosure of information related to adjudications.

From:	Gavin Young
To:	Committee on Adjudication (Gov)
Subject:	ACUS Committee on Adjudication: Recusal Rules - Nov. 6 Meeting
Date:	Tuesday, October 30, 2018 1:03:22 PM
Attachments:	image001.png Committee on Adjudication Meeting Agenda - November 6 Recusal Rules.pdf

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Dear Members of the Committee on Adjudication and Interested Persons:

Thank you for your participation in the Committee's consideration of Recusal Rules for Administrative Adjudicators. The Committee will hold its third meeting for this project on **Tuesday, November 6, from 1:00 pm to 4:00 pm ET**. Attached, please find the meeting agenda. A new draft of the proposed recommendations will be circulated prior to the meeting.

To RSVP for the this meeting, please reply to info@acus.gov and indicate: Yes (in person), Yes (via teleconference), or No.

For those attending in person, the meeting will be held at ACUS, at **1120 20th Street NW, Suite 706 South**. When you arrive at Lafayette Centre, please enter the south building and take an elevator to the seventh floor. The meeting will take place in the conference room next to the elevators. For those attending remotely, remote attendance information is at the bottom of this email.

Remote attendance information:
Please join my meeting from your computer, tablet or smartphone.
https://global.gotomeeting.com/join/291125845
You can also dial in using your phone.
United States: +1 (646) 749-3122
Access Code: 291-125-845
First GoToMeeting? Let's do a quick system check: https://link.gotomeeting.com/system-check

Please reply to me at gyoung@acus.gov if you have any questions, and thank you for your service to the Administrative Conference.

Sincerely,

Gavin Young | Counsel for Congressional Affairs
cid:image001.png@01D38973.B4086610

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gyoung@acus.gov . www.acus.gov

Committee on Adjudication
Public Meeting Agenda

November 6, 2018, 1:00 P.M. ET
1120 20th St NW, Suite 706 South, Washington, DC 20036
Remote Attendance at: https://global.gotomeeting.com/join/291125845 or
by phone at: +1 (646) 749-3122 / Access Code: 291-125-845

I. Meeting Opening—Nadine Mancini, Committee Chair

II. Presentation—Prof. Louis J. Virelli, III

III. Committee Consideration of Draft Recommendation

IV. Comments by Public Attendees (if Committee consents)

V. Closing Remarks—Nadine Mancini, Committee Chair

From: Gavin Young
To: Committee on Adjudication (Gov)
Subject: ACUS Committee on Adjudication: Recusal Rules - Draft Recommendations and Nov. 6 Meeting
Date: Thursday, November 1, 2018 4:33:50 PM
Attachments: image001.png
Recusal Rules Draft Recommendations 11-1-18.pdf

Dear Members of the Committee on Adjudication and Interested Persons:

Attached, please find the draft recommendations for Recusal Rules Administrative Adjudicators which will be considered at the Committee's third meeting for this project on **Tuesday, November 6, at 1:00pm ET**. Of note, this draft includes a preamble and two additional paragraphs at the end of Paragraph 4, neither of which were considered by the Committee in prior meetings.

Thank you to those who have already RSVPed for this meeting. For those who have not, please reply to this email and indicate the nature of your attendance (in person / remote).

Please also reply to me at gyoung@acus.gov if you have any questions, and thank you for your service to the Administrative Conference.

Sincerely,

Gavin Young | Counsel for Congressional Affairs
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1120 20th Street, NW Suite 706 South . Washington, DC . 20036
(202) 480-2080 (tel.) . (202) 386-7190 (f)
gyoung@acus.gov . www.acus.gov

From: Gavin Young
Sent: Tuesday, October 30, 2018 1:03 PM
To: Committee on Adjudication (Gov)
Subject: ACUS Committee on Adjudication: Recusal Rules - Nov. 6 Meeting

Dear Members of the Committee on Adjudication and Interested Persons:

Thank you for your participation in the Committee's consideration of Recusal Rules for Administrative Adjudicators. The Committee will hold its third meeting for this project on **Tuesday, November 6, from 1:00 pm to 4:00 pm ET**. Attached, please find the meeting agenda. A new draft of the proposed recommendations will be circulated prior to the meeting.

To RSVP for the this meeting, please reply to info@acus.gov and indicate: Yes (in person), Yes (via teleconference), or No.

For those attending in person, the meeting will be held at ACUS, at **1120 20th Street NW, Suite 706 South**. When you arrive at Lafayette Centre, please enter the south building and take an elevator to the seventh floor. The meeting will take place in the conference room next to the elevators. For those attending remotely, remote attendance information is at the bottom of this email.

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You can also dial in using your phone.
United States: +1 (646) 749-3122
Access Code: 291-125-845
First GoToMeeting? Let's do a quick system check: https://link.gotomeeting.com/system-check

Please reply to me at gyoung@acus.gov if you have any questions, and thank you for your service to the Administrative Conference.

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gyoung@acus.gov . www.acus.gov

ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Recusal Rules for Administrative Adjudicators

Committee on Adjudication

Proposed Recommendation for Committee | November 6, 2018

Recusal, the voluntary or involuntary withdrawal of an adjudicator from a particular proceeding, is an important tool for maintaining the integrity of agency adjudication. Recusal serves two important purposes. First, it ensures that parties to an adjudicative proceeding have their claims resolved by an impartial decisionmaker. This aspect of recusal is reflected in the Due Process Clause as well as statutory, regulatory, and other sources of recusal standards. Second, recusal promotes the legitimacy of the adjudicative system as a whole by creating the appearance of impartiality; the recusal of adjudicators who may appear partial inspires public confidence in administrative adjudication in ways that a focus on actual bias against the parties themselves cannot.[1] Appearance-based recusal standards are in general not constitutionally required, but have been codified in judicial recusal statutes as well as model codes.[2] Unlike with judicial recusal, there is no uniformity regarding how agencies approach appearance-based recusal in the context of adjudication.

In Recommendation 2016-4, *Evidentiary Hearings Not Required by the Administrative Procedure Act*, the Conference recommended that agencies require adjudicator recusal in the case of actual bias.[3] This recommendation builds upon Recommendation 2016-4 by addressing the need for agency-specific recusal regulations that consider the full range of actual and

[1] Louis J. Virelli, III, Recusal Rules for Administrative Adjudicators (October 29, 2018) (report to the Admin. Conf. of the U.S.), https://www.acus.gov/report/second-draft-report-recusal-rules-administrative-adjudicators.
[2] *See* 28 U.S.C. § 455(a); MODEL CODE OF JUDICIAL CONDUCT FOR FEDERAL ADMINISTRATIVE LAW JUDGES Canon 3(C) (AM. BAR ASS'N 1989), *available at* http://digitalcommons.pepperdine.edu/cgi/viewcontent.cgi?article=1521&context=naalj. Both require recusal by federal judges where their "impartiality might reasonably be questioned."
[3] Admin. Conf. of the U.S., Recommendation 2016-4, *Evidentiary Hearings Not Required by the Administrative Procedure Act*, 81 Fed. Reg. 94,314 (Dec. 23, 2016).

apparent bias. It focuses on a variety of agency adjudications, including those governed by the adjudication provisions of the Administrative Procedure Act (APA), as well as adjudications not governed by the APA but nonetheless consisting of evidentiary hearings required by statute, regulation, or executive order.[4] It also covers appeals from those adjudications. This Recommendation does not, however, apply to adjudications conducted by agency heads, as there are additional considerations associated with their role as chief policy makers for their agencies.

A comprehensive set of recusal rules addresses instances of actual and apparent bias within the covered adjudications. Recusal rules can be used to protect litigants and promote public confidence in agency adjudication without compromising the agency's ability to fulfill its mission effectively and efficiently. This necessarily lends itself to standards that are designed in accord with the specific needs and structure of each agency but that also allow for fact-specific determinations regarding the appearance of adjudicator impartiality. This contextualized nature of administrative recusal standards is reflected in the list of relevant factors in Paragraph 3 below. These factors are for agencies to consider in fashioning their own recusal regulations, and the parenthetical explanations accompanying them show how different features of an agency's administrative scheme may affect the stringency of those regulations.

Recusal rules also permit the parties to petition their adjudicator to recuse in the event he or she does not elect to do so in the initial instance. This right of petition promotes more informed and accountable recusal decisions. Recusal rules can further provide for intra-agency appeal of those decisions. Such appeals are typically performed by other agency adjudicators acting in an appellate capacity but may also include the official responsible for the adjudicator's work assignments. This right of intra-agency appeal increases the reliability and accuracy of recusal determinations and could help ensure the consistency and effectiveness of the work assignment process. Finally, recusal rules could provide for the publication of recusal

[4] In the context of Recommendation 2016-4 and the associated consultant report, adjudications with evidentiary hearings governed by the APA adjudication sections (5 U.S.C. §§ 554, 556, and 557) and adjudications that are not so governed but that otherwise involve a legally required hearing have been named, respectively, "Type A" and "Type B" adjudications. This Recommendation includes both Type A and Type B adjudications but does not apply to adjudications that do not involve a legally required evidentiary hearing (known as "Type C" adjudications). *See* Admin. Conf. of the U.S., Recommendation 2016-4, *Evidentiary Hearings Not Required by the Administrative Procedure Act*, 81 Fed. Reg. 94,314 (Dec. 23, 2016); Michael Asimow, Evidentiary Hearings Outside the Administrative Procedure Act 2 (November 10, 2016) (report to the Admin. Conf. of the U.S.), https://www.acus.gov/report/evidentiary-hearings-outside-administrative-procedure-act-final-report.

determinations, which increases transparency and thus the appearance of impartiality in recusal decisions themselves.

It is important to distinguish agency-specific recusal rules from the ethics rules promulgated by the Office of Government Ethics (OGE).[5] As an initial matter, the two are not mutually exclusive. Even where ethical and recusal regulations overlap, it is entirely possible and coherent to enforce both. This is due, at least in part, to the differences in scope, form, and enforcement mechanisms between the two. Ethics rules focus on preventing conflicts of interest among executive branch employees. Recusal rules focus on ensuring the integrity and perceived integrity of adjudicative proceedings. Recusal rules are thus broader in focus and narrower in application than ethics rules. In this light, ethics rules tend to be very precise, as agency employees need clear guidance to ensure that they behave ethically. Recusal rules, by contrast, tend to be much more open-ended and standard-like, since they are focused on maintaining both actual impartiality and the *appearance of* impartiality of adjudicative proceedings, which may be compromised by conduct that would not constitute a breach of any ethics rule, such as advocating a particular policy in a speech before a professional association. The enforcement mechanism is also different. A potential ethics issue is investigated privately inside the agency, whereas the recusal process is public and can be initiated by a party to the adjudication if an adjudicator does not recuse him or herself in the first instance.

An agency that wishes to supplement its ethics rules should, of course, work through the OGE supplemental process.[6] Under that process, agencies, with the concurrence of OGE, may enact ethics rules that supplement existing OGE rules. This recommendation focuses exclusively on the separate body of recusal rules an agency may wish to adopt to preserve the appearance of impartiality in its adjudicative proceedings.

[5] The Ethics in Government Act of 1978 (P.L. 95-521) established the Office of Government Ethics to provide "overall direction of executive branch policies related to preventing conflicts of interest on the part of officers and employees of any executive agency." OGE's *Standards of Ethical Conduct for Employees of the Executive Branch* are available at 5 C.F.R. Part 2635.

[6] *See* Standards of Ethical Conduct for Employees of the Executive Branch, 5 C.F.R. § 2635.105.

RECOMMENDATION

1. Agencies should adopt rules for recusing adjudicators who preside over adjudications governed by the adjudication sections of the Administrative Procedure Act (APA) as well as those not governed by the APA but administered by federal agencies through evidentiary hearings required by statute, regulation, or executive order. The recusal rules should also apply to adjudicators who conduct intra-agency appellate review of decisions from those hearings, but not necessarily to agency heads. When adopting such rules, agencies should consider the actual and perceived integrity of agency adjudications and the effectiveness and efficiency of adjudicative proceedings.
2. Agency rules should, consistent with ACUS Recommendation 2016-4, provide for the recusal of adjudicators in cases of actual adjudicator partiality, referred to as bias in ACUS Recommendation 2016-4, including:
    a. Improper financial or other personal interest in the decision;
    b. Personal animus against a party or group to which that party belongs; or
    c. Prejudgment of the adjudicative facts at issue in the proceeding.
3. Agency recusal rules should preserve the appearance of impartiality among its adjudicators. Such rules should be tailored to accommodate the specific features of an agency's adjudicative proceedings and its institutional needs, including consideration of the following factors:
    a. The regularity of the agency's appearance as a party in proceedings before the adjudicator (the more frequently an adjudicator must decide issues in which his or her employing agency is a party, the more attentive the agency should be in ensuring that its adjudicators appear impartial);
    b. Whether or not the hearing is part of enforcement proceedings (an agency's interest in the outcome of enforcement proceedings could raise public skepticism about adjudicators' ability to remain impartial and thus require stronger appearance-based recusal standards);
    c. The agency's adjudicative caseload volume and capacity, including the number of other adjudicators readily available to replace a recused adjudicator (if recusal could realistically infringe upon an agency's ability to adjudicate by depriving it

of necessary adjudicators, then more flexible appearance-based recusal standards may be necessary);

d. Whether a single adjudicator renders a decision in proceedings, or whether multiple adjudicators render a decision as a whole (concerns about quorum, the administrative complications of tied votes, and preserving the deliberative nature of multi-member bodies may counsel in favor of more flexible appearance-based recusal standards); and

e. Whether the adjudicator acts in a reviewing/appellate capacity (limitations on appellate standards of review could reduce the need for strict appearance-based recusal standards, but the greater authority of the reviewer could warrant stronger appearance-based recusal standards).

4. Agency recusal rules should also include procedural provisions for agencies to follow in determining when recusal is appropriate. At a minimum, those provisions should include the right of petition for parties seeking recusal, initial determination by the presiding adjudicator, and intra-agency appeal.

Note: The following paragraphs are intended for consideration by the Committee as additions to Paragraph 4 above. They were not part of the Recommendations which were approved by the Committee at its meeting on October 24, 2018:

Adjudicators should provide, and agencies should publish, written explanations of adjudicators' recusal decisions. Similarly, appellate reviewers of adjudicators' recusal decisions should provide, and agencies should publish, written explanations of the appellate reviewers' decisions.

In cases where an initial recusal decision involves an adjudicator whose decisions are only reviewable by an agency head, agencies should permit appellate review of that adjudicator's recusal decision by other agency adjudicators with the same level of authority within the agency's adjudication structure.

From:	Rothschild, Roxanne L.
To:	Ketcham, Lori; Leverone, Susan
Subject:	FW: ACUS Adjudication Committee: Recusal Rules Project - Oct. 10 Meeting Info and Project Documents
Date:	Thursday, October 4, 2018 5:46:14 PM
Attachments:	image001.png Committee on Adjudication Meeting Agenda - October 10 Recusal Rules.pdf Recusal Rules for Administrative Adjudicators - Louis Virelli Draft Report, October 4.pdf Recusal Rules for Administrative Adjudicators - Draft Recommendations for Committee, October 4.pdf

FYI

Roxanne Rothschild
Deputy Executive Secretary
National Labor Relations Board
1015 Half Street SE, Office 5010, Washington, DC 20570
roxanne.rothschild@nlrb.gov | 202-273-2917

From: Gavin Young [mailto:gyoung@acus.gov]
Sent: Thursday, October 04, 2018 4:38 PM
To: Committee on Adjudication (Gov) <COA@acus.gov>
Subject: ACUS Adjudication Committee: Recusal Rules Project - Oct. 10 Meeting Info and Project Documents

Dear Members of the Committee on Adjudication and Interested Persons:

This is a reminder that the Committee's first meeting to discuss Recusal Rules for Administrative Adjudicators is on **Wednesday, October 10, from 1:00 pm to 4:00 pm ET**. For those that have yet to respond, please RSVP by replying to info@acus.gov and indicating whether you will attend, and whether your attendance is in person or via teleconference.

For those attending in person, the meeting will be held at ACUS, at **1120 20th Street NW, Suite 706 South**. When you arrive at Lafayette Centre, please enter the south building and take an elevator to the seventh floor. The meeting will take place in the conference room next to the elevators. For those attending remotely, remote attendance information is at the bottom of this email.

For consideration at the meeting, the following documents are attached. They will also be posted on the project page shortly:

1. October 10 Meeting Agenda
2. Draft Report by Project Consultant Prof. Louis J. Virelli
3. Draft Recommendations for Consideration

As a reminder, our second meeting on this project is scheduled for Wednesday, October 24, from 1:00 pm to 4:00 pm.

For those participating remotely, please follow the instructions below, and note that the system requires you to log in to the "GoToMeeting" program using either a computer or a smartphone:

Please join my meeting from your computer, tablet or smartphone.
https://global.gotomeeting.com/join/285336469
You can also dial in using your phone.
United States: **+1 (571) 317-3112**
Access Code: **285-336-469**
First GoToMeeting? Let's do a quick system check: https://link.gotomeeting.com/system-check

Please reply to me at gyoung@acus.gov if you have any questions, and thank you for your service to the Administrative Conference.

Sincerely,

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Committee on Adjudication
Public Meeting Agenda

October 10, 2018, 1:00 P.M. ET
1120 20th St NW, Suite 706 South, Washington, DC 20036
Remote Attendance at: https://global.gotomeeting.com/join/285336469 or
by phone at: +1 (571) 317-3112 / Access Code: 285-336-469

I. Meeting Opening—Nadine Mancini, Committee Chair

II. Presentation of Draft Report—Louis J. Virelli, III

III. Committee Consideration of Draft Recommendation

IV. Comments by Public Attendees (if Committee consents)

V. Closing Remarks—Nadine Mancini, Committee Chair

Administrative Conference of the United States

RECUSAL RULES FOR ADMINISTRATIVE ADJUDICATORS

Draft Report: October 4, 2018

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This report was prepared for the consideration of the Administrative Conference of the United States. The opinions, views and recommendations expressed are those of the author and do not necessarily reflect those of the members of the Conference or its committees, except where formal recommendations of the Conference are cited.

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EXECUTIVE SUMMARY

The integrity of agency action is critically important for the efficacy and legitimacy of administrative government. This is especially true for agency adjudication, as it is the form of agency action that most directly impacts individuals. Recusal—the process by which an adjudicator is removed, voluntarily or involuntarily, from a specific proceeding—is a time-honored way of protecting the integrity of all manner of quasi-judicial activity, including agency adjudication. The current landscape of agency recusal standards, which consists of government ethics rules, constitutional protections, and statutory requirements, exhibits gaps in coverage that are best filled by agency-specific recusal regulations. This report discusses the need for such regulations and best practices for their promulgation and implementation. One of the principal issues it will address is whether agencies should adopt recusal rules that are distinct from ethics rules that apply to all federal employees.

Adjudication is an extremely broad and amorphous category of agency action. Studying adjudication, therefore, requires some difficult choices. This project focuses on a subset of agency adjudication—administrative proceedings in which evidentiary hearings are legally required—for two reasons. First is that the category is easy to define. It has few required features that are relatively easy to identify. Second is that this category of agency adjudication is at least comparable to traditional judicial proceedings, so we can use what we know about the integrity of judicial decisions as a starting point for examining the integrity of agency adjudication.

With respect to this type of adjudication, there are several tools that agencies can use to protect the integrity of their proceedings. Among the oldest and most well-known is recusal. Recusal serves two important purposes. The first is that it protects litigants from impartial or biased decision makers. The second is that it promotes public confidence in the fairness and reliability of government adjudication. This is important because judges and adjudicators typically do not have the power to enforce their own decisions; they must rely on other government actors to ensure that the parties to a proceeding comply with their orders. That compliance is far easier to achieve if the public has confidence in the integrity of the adjudicatory process.

Unlike courts, which can rely on a long tradition of recusal law, agencies' recusal requirements are less clear. This project addresses the question of whether agencies should enact their own, agency-specific recusal regulations and, if so, what sources of law and procedural requirements they should consider in doing so.

The existing legal framework for administrative recusal consists of several parts, each of which exhibits strengths and weaknesses for promoting the integrity of agency adjudications. The Due Process Clause of the Constitution protects litigants against adjudicators who present a

probability of actual bias against a party, but does far less to promote public confidence in the adjudicative system because it does not directly address the outward appearance of agency bias. The federal recusal statute is an example of how to achieve both of recusal's ultimate goals, but it applies only to courts, not agencies, and may in any event be too broad for agency adjudicators that must decide cases in which their employer, the agency itself, is a party. The American Bar Association model codes are also useful examples of how to use recusal aggressively to achieve both of its goals, but they are not legally binding and may be too broad for the same reasons as the federal recusal statute. Government ethics rules seem like a natural source of recusal standards for agency adjudicators, but they are designed for a much wider range of actors (all executive branch employees, rather than just adjudicators), and are limited to financial and relationship-based conflicts of interest, which do not protect against all forms of actual or apparent bias. The Administrative Procedure Act (APA) and existing agency recusal regulations are useful, but the APA applies to a smaller set of adjudicators than this study seeks to capture and is limited to specific instances of actual or potential (as opposed to apparent) bias. Agency regulations vary widely, but as a rule, they do not focus on problems of public perception and appearance, and when they do, they are often limited in other areas. Taken together, the existing recusal framework for agency adjudicators leaves gaps that must be filled in order for agencies to protect fully the integrity of their adjudications.

This study concludes that the best way to fill those gaps is for agencies to promulgate regulations governing recusal for their own adjudicators. Agencies should consider the specific nature and demands of their own adjudicative system to design a set of recusal standards that will protect parties against actual bias as well as project the appearance of impartiality to a watchful public. In addition to recusal standards, agencies' regulations should also include procedures for resolving recusal questions, including a way for parties to bring recusal issues to the presiding adjudicator and a process to appeal the initial recusal decision both in and outside of the agency. In sum, agencies must consider the nature of their proceedings and of their adjudicators, as well as institutional needs and limitations in order to promulgate regulations that best balance adjudicative integrity with the agency's need for timely and effective adjudications.

I. PROJECT DESCRIPTION

Administrative adjudication is a powerful and wide-ranging tool for implementing agencies' statutory missions. Adjudication's more specific, individualized determinations implicate litigants' rights to fair and impartial treatment more directly than other agency conduct, like rulemaking. As a result, basic notions of administrative legitimacy[1] and due process make the independence and integrity of agency adjudicators critically important to both the

[1] *See, e.g.*, Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 462 (2003) ("From the birth of the administrative state, we have struggled to describe our regulatory government as the legitimate child of a constitutional democracy.").

effectiveness of, and public confidence in, administrative government. Recusal[2]—the process by which an adjudicator is removed, voluntarily or involuntarily, from a specific proceeding—is a powerful tool in protecting the integrity of agency adjudicators. Agency recusal is currently governed by government ethics rules, various statutory provisions, and the Due Process Clause. Taken together, these sources of recusal standards leave potentially important features of agency integrity unprotected. This project seeks to identify areas left unaccounted for by existing sources of agency recusal standards, and proposes that agencies adopt agency-specific recusal regulations to fill those gaps in the current landscape of administrative recusal.

There are several issues that influence the independence and integrity of agency adjudicators. For example, appointment and removal, congressional oversight, *ex parte* contacts, and adjudicator compensation all affect adjudicators' independence and, in turn, the integrity of the proceedings they preside over. The same is true for recusal.

In the judicial context, recusal is as old as courts themselves. Since Justinian's time, judges have either removed themselves or been forced to withdraw from cases for a variety of (mostly ethical) reasons. Recusal fulfills two primary purposes. First, it protects individual litigants against biased or conflicted adjudicators to ensure a fair and objective resolution of their claims. Second, it protects the integrity of the adjudicatory system by promoting public confidence in the impartiality and fairness of the adjudicative process. In modern American jurisprudence, federal judicial recusal is governed by at least two sources of law; the Due Process Clause and wider-reaching recusal statutes.[3]

Recusal has a role in administrative adjudication that is at least analogous to its role in judicial proceedings. Administrative adjudicators remove themselves—either voluntarily or pursuant to some mandatory legal standard—from proceedings over which they would otherwise preside in order to protect both the rights of the parties to an impartial hearing and the public's confidence in the adjudicative system. Unlike with judicial recusal, however, administrative adjudicators do not have the benefit of a generally applicable recusal statute to help guide their decisions.[4] The law of administrative recusal comes from multiple sources, many of which are either not binding on agency adjudicators or were not specifically designed for agency actors responsible for presiding over evidentiary hearings.

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[2] Historically, the process by which judges removed themselves from a case was called recusal, and the process by which they were forced to withdraw was called disqualification. In modern practice, the two terms are used interchangeably. RICHARD E. FLAMM, JUDICIAL DISQUALIFICATION: RECUSAL AND DISQUALIFICATION OF JUDGES § 1.1, at 4 (Banks & Jordan 2d ed. 2007) ("In fact, in modern practice 'disqualification' and 'recusal' are frequently viewed as synonymous, and employed interchangeably."). For consistency's sake, recusal will be used here to refer to both situations—voluntary and involuntary withdrawal of an agency adjudicator.

[3] U.S. CONST. amend. V; 28 U.S.C. § 455 (federal judicial recusal statute).

[4] 28 U.S.C. § 455.

The current reality of administrative recusal thus begs several questions. First, would more targeted, agency-specific recusal rules bring more clarity, consistency, and integrity to administrative adjudication? If so, to what sources of law should agencies look before fashioning such rules and how should those rules be promulgated? Finally, what procedures should agencies employ to enforce recusal rules, and should those rules treat different adjudicators within an agency—hearing officers versus appellate adjudicators, for instance—differently? This project seeks to address these questions by building on two recent Administrative Conference of the United States (ACUS) studies of administrative adjudication to examine the various laws and standards affecting recusal for a defined subset of agency adjudicators and to evaluate whether more tailored recusal regulations would further the goals of impartiality and public confidence that are necessary to good government.

II. SCOPE OF THE PROJECT

The term adjudication covers a vast array of agency conduct. The difficulty in accurately defining and organizing all of the agency conduct that fits under the umbrella of agency adjudication requires some line drawing. In general, one distinct category of adjudication—referred to generally here as "Type A" adjudication—consists of evidentiary hearings prescribed by certain provisions of the Administrative Procedure Act (APA) and presided over by administrative law judges (ALJs).[5] A second category is comprised of evidentiary hearings that are required by law but are not governed by the same APA sections and do not involve ALJs (in general, "Type B" adjudication).[6] Finally, the largest (and most widely varied) category of agency adjudication is that which does not require—yet may permit—an evidentiary hearing.[7]

Two recent ACUS studies have focused on the second category of adjudication described above: legally required evidentiary hearings that are not presided over by ALJs. Both studies built on a collection of previous ACUS studies that examined various aspects of non-ALJ agency adjudication.[8]

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[5] Type A adjudication is defined by Michael Asimow in his recent ACUS study as "adjudicatory systems governed by the adjudicatory sections [§§ 554, 556, and 557] of the APA . . . [and] presided over by administrative law judges (ALJs)." MICHAEL ASIMOW, EVIDENTIARY HEARINGS OUTSIDE THE ADMINISTRATIVE PROCEDURE ACT 2 (2016) ("Asimow Study").

[6] Although referring to this category of adjudication as Type B adjudication is useful and adequate for present purposes, it is not completely accurate. The Asimow Study defined Type B adjudication as "evidentiary hearings required by statute, regulation, or executive orders, that are not governed by the adjudication provisions [§§ 554, 556, 557] of the APA" and that are decided exclusively on the record developed during the proceeding (the "exclusive-record limitation"). *See id.* at 2. A more recent ACUS study focused only on Type B proceedings that required oral, as opposed to purely written, evidentiary hearings, but did not require that those proceedings include the "exclusive-record limitation" used in the Asimow Study. KENT BARNETT, MALIA REDDICK, LOGAN CORNETT, & RUSSELL WHEELER, NON-ALJ ADJUDICATORS IN FEDERAL AGENCIES: STATUS, SELECTION, OVERSIGHT, AND REMOVAL 13 (2017) ("Barnett et al. Study"). Because this project considers a wider range of evidentiary hearings by agency adjudicators, the relatively slight distinctions between the types of hearings examined in the Asimow and Barnett Studies is not directly relevant to the present discussion.

[7] This category is described in the Asimow Study as "Type C" adjudication. *See* Asimow Study, *supra* note 5, at 2.

[8] The first study of non-ALJ adjudication was a 1989 ACUS-sponsored survey by John Frye, who had served as both an ALJ and a non-ALJ ("the Frye Study"). The Frye Study cataloged the use of non-ALJs in oral evidentiary hearings, and the results were published in a 1992 law review article. *See* John H. Frye III, *Survey of Non-ALJ Hearing Programs in the Federal Government*, 44 ADMIN. L. REV. 261 (1992). Next was a comprehensive 1992 study by Paul Verkuil, Daniel Gifford, Charles Koch, Richard Pierce, and Jeffrey Lubbers ("the 1992 Study"). PAUL R. VERKUIL ET AL., THE FEDERAL ADMINISTRATIVE JUDICIARY (1992). The 1992 Study built on the Frye Study and included information on the history and variety of administrative adjudications; the attitudes, selection, and independence of agency adjudicators; the effect of adjudicators' decisions; and standards for when agencies should rely on ALJs for their adjudications. *See id.* The third study was a survey by Raymond Limon, who primarily updated the Frye Study's data on non-ALJs. RAYMOND LIMON, OFFICE OF ADMIN. L. JUDGES, THE FEDERAL ADMINISTRATIVE JUDICIARY THEN AND NOW—A DECADE OF CHANGE 1992–2002, at 2 (1992).

In connection with the *Evidentiary Hearings Outside the Administrative Procedure Act* project, Administrative Conference attorneys, working with Professor Michael Asimow (the project consultant), created a database containing "information about all of the schemes of Type A and Type B federal agency adjudication." Professor Asimow then relied on this information and conducted additional research to "formulate . . . best practices for Type B adjudication."("the Asimow Study")[9] Drawing on Professor Asimow's work, the ACUS Assembly adopted Recommendation 2016-4, which recommended that agencies promulgate regulations addressing three distinct categories of adjudicator bias: bias resulting from "(i) a financial or other personal interest in the decision; (ii) personal animus against [a party or agency attorney]; [or] (iii) prejudgment of the adjudicative facts at issue in the proceeding."[10] These three instances of bias were included as grounds for recusal of Type B adjudicators in Administrative Conference Recommendation 2016-4.[11]

In 2018, Kent Barnett, Malia Reddick, Logan Cornett, and Russell Wheeler submitted *Non-ALJ Adjudicators and Federal Agencies: Status, Selection, Oversight, and Removal* ("the Barnett et al. Study"). The Barnett et al. Study: addressed issues related to selection, oversight, evaluation, discipline, and removal of non-ALJ adjudicators. It also supplemented and updated information from prior ACUS studies, as well as suggesting best practices for Type B adjudication.[12] Of particular interest to this project is the study's treatment of "Non-ALJ Oversight and Independence," which included recusal standards. Like Asimow, the Barnett et al. Study suggested that agencies promulgate standards for non-ALJs that "clearly state the grounds for disqualification" and that outline procedures for enforcing and reviewing the application of those standards.[13] The proposed recommendation associated with the Barnett et al. Study suggested that agencies consider pursuing "supplemental regulations pertaining to the disqualification of administrative judges from particular hearings that augment [the Office of Government Ethics's (OGE's)] standards . . . govern[ing] the disqualification of federal employees from participating in particular matters due to the appearance of loss of impartiality."[14]

This project approaches the issue of administrative recusal from the foundation laid by Asimow and Barnett. It takes a broader and more detailed look at the relevant legal and other

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[9] *Id.* at 2, 4.
[10] *See* Recommendation 2016-4, at ¶ 5, adopted Dec. 13, 2016, https://www.acus.gov/sites/default/files/documents/informal-agency-adjudication-recommendation-final.pdf.
[11] *See id.*
[12] *See* Barnett et al. Study, *supra* note 6, at 11-12. As mentioned *supra* in note 6, the category of adjudication considered in the Barnett et al. Study was not precisely the same as what the Asimow Study defined as Type B adjudication, but the differences between the two remain immaterial for present purposes.
[13] *Id.* at 64.
[14] Proposed Recommendation, ADMINISTRATIVE JUDGES, June 14, 2018, at 6-7, https://www.acus.gov/sites/default/files/documents/Proposed%20Recommendation%20for%20Plenary_0.pdf.

sources of administrative recusal standards, and asks whether there is a need within this landscape for agency-specific recusal regulations.

The answer depends on the category of agency adjudication being examined. In order to make the focus of this study as clear as possible, it focused on the recusal of Type A and B adjudicators (rather than simply all government employees). It therefore includes ALJs, which were part of the adjudication database created by Administrative Conference attorneys and Professor Asimow in connection with *Evidentiary Hearings Outside the Administrative Procedure Act*, but were not included in either the Asimow Study or the Barnett et al. Study. The current study also includes Type B adjudicators, but defines the relevant universe of these non-ALJ adjudicators differently than previous studies. The Type B adjudicators included here are those who preside over evidentiary hearings required by statute, regulation, or executive order, and who decide appeals of decisions arising from those hearings. This definition is broader than that used in the Barnett et al. Study in that it—like the Asimow Study—includes non-ALJ adjudicators who preside over legally required written and oral (as opposed to just oral) hearings. It is also technically broader than the Asimow Study's definition because it is not limited to hearings decided exclusively on the record developed during the proceeding, although that may in fact be, at least with regard to required written hearings, a distinction without a difference.[15] In sum, the scope of adjudicators considered in this study is broader than the Barnett et al. Study and at least as broad as the Asimow Study. It is also—and perhaps most importantly so—simpler and easier to describe when requesting information about agencies' recusal standards and practices. This combination of breadth and simplicity is designed to maximize the range and depth of information obtained about recusal in agency adjudications.

Due to the wide range of adjudicators targeted by this study, this report examines a similarly broad scope of recusal-related sources to identify any gaps in existing standards and practices that may indicate a need for agency-specific recusal regulations. It is important to note that references to the substantive limitations of certain legal or ethical frameworks with regard to recusal are not intended as criticisms of those provisions. The purpose of the following section is to explore the existing landscape of legal and other provisions that could potentially affect administrative recusal. Many of those provisions are not targeted at agencies, adjudication, or both, and as such should not be expected to provide comprehensive recusal standards. It is nevertheless necessary to examine the full range of potentially relevant sources in order to evaluate the potential utility of agency-specific rules.

As seen in the following section, there does appear to be a range of adjudicator conduct that could merit recusal yet is not currently regulated.

[15] As the Barnett et al. Study revealed, "we are not aware of any [oral] hearings that the agencies identified that lack an exclusive-record limitation." Barnett et al. Study, *supra* note 6, at 13.

III. THE "LAW" OF RECUSAL FOR ADMINISTRATIVE ADJUDICATORS

A. Due Process

Due process has two related, but conceptually distinct, applications. First, due process ensures that parties will receive adequate notice and an opportunity to be heard in connection with the resolution of their claims or defenses before an impartial adjudicator.[16] The scope of the required notice and hearing depends at least in part on the parties' level of personal interest in the outcome of the proceeding.[17] Proceedings with more formalized, rigorous procedures can be understood to recognize a greater personal interest in the outcome of those proceedings.

A litigant's opportunity to be heard depends, in turn, on both the literal availability of a forum to hear their claims and the ability of that forum to resolve them fairly. The fairness of the resolution is premised on the notion that all parties to an adjudication are entitled to a neutral, unbiased arbiter.[18] This includes a range of requirements relating to an adjudicator's impartiality, from "an absence of actual bias"[19] against the parties to the admonitions that "no man shall be a judge in his own case"[20] and that the "possible temptation to the average man as a judge . . . not to hold the balance nice, clear, and true between the [parties] denies [them] due process of law."[21]

Just like judicial proceedings, administrative adjudication must satisfy all of these criteria to pass constitutional muster.[22] Recusal can be a powerful tool to remedy due process violations, especially in cases where the adjudicator exhibits actual or probable bias against a party or has a personal conflict of interest. The Supreme Court has confirmed recusal's role in these cases, but has been reluctant to apply due process protections too broadly. The Court has applied the Due Process Clause most readily in cases where the adjudicator had a financial interest in the outcome of a case or where some other conflict of interest exists, such as when a judge that charged a party with contempt presided over that party's contempt hearing.[23] The Court's two most recent cases on the issue both involved state supreme court justices. The Court found due process violations in those cases where a justice participated in a case in which his largest judicial campaign donor was a party, and where a justice took part in the review of a defendant's death sentence that the justice had personally approved while serving as the district attorney

[16] Mathews v. Eldridge, 424 U.S. 319 (1976).
[17] *Id.* at 334-35.
[18] Caperton v. A.T. Massey Coal Co., 556 U.S. 868, 877 (2009) ("It is axiomatic that '[a] fair trial in a fair tribunal is a basic requirement of due process.'" (quoting In re Murchison, 349 U.S. 133, 136 (1955)).
[19] Williams v. Pennsylvania, 136 S. Ct. 1899, 1905 (2016) (quoting *Murchison*, 349 U.S. at 136).
[20] Caperton, 556 U.S. at 886 ("[N]o man is allowed to be a judge in his own cause . . . .").
[21] *Murchison*, 349 U.S. at 136 (quoting Tumey v. State of Ohio, 273 U.S. 510, 532 (1927)).
[22] *See* Londoner v. City and County of Denver, 210 U.S. 373 (1908). Due process of course applies to all forms of adjudication, including adjudicative decisions that do not involve evidentiary hearings.
[23] *See, e.g.*, *Tumey*, 273 U.S. at 310 (financial interest); *Murchison*, 349 U.S. at 133 (contempt).

responsible for the case.[24] In each instance, the Court cited the "probability of actual bias" on the judge's part as grounds for recusal. This is the Court's current standard for recusal under the Due Process Clause.[25]

Despite its willingness to find due process violations in these cases, the Supreme Court has consistently reaffirmed that most recusal cases do not implicate the Due Process Clause. In the process of ruling that a Federal Trade Commissioner's previous public comments about a legal issue did not require his recusal from a case involving that issue, that Court made clear that "most matters relating to judicial disqualification [do] not rise to a constitutional level,"[26] and that "'matters of kinship, personal bias, state policy, [and] remoteness of interest, would seem generally to be matters merely of legislative discretion.'"[27] This qualification is a consistent theme in the Court's recusal jurisprudence, and serves as a demarcation of the boundary between the narrow range of due process recusals—recusals based on whether a reasonable judge would likely be biased in a given case and that often involve what Justice Kennedy called "extreme facts"[28]—and the broader universe of situations that could raise concerns about the impartiality and legitimacy of an adjudicator's decision.

B. Federal Recusal Statute

The federal recusal statute, 28 U.S.C. § 455, represents the broadest recusal standard applicable to federal adjudicators. In addition to requiring recusal in instances of personal bias, previous involvement in (or knowledge of) the case at hand, financial interest, and familial and other personal relationships, § 455 requires recusal in any case where a judge's "impartiality might reasonably be questioned" (the "reasonable appearance standard").[29] This standard is a popular and relatively new development in American recusal law.[30] The reasonable appearance standard was designed to promote public confidence in the judiciary by ensuring that cases are

[24] *Caperton*, 556 U.S. at 868 (campaign donation); Williams v. Pennsylvania, 136 S. Ct. 1899 (2018) (district attorney).

[25] The Court has noted that "justice must satisfy the appearance of justice" under the Due Process Clause, Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813, 825 (1986) (quoting Murchison, 349 U.S. at 136), but its holdings and other statements about the limits of due process recusal make clear that this statement is not meant to conflate constitutional recusal requirements with the broader "impartiality might reasonably be questioned" standard in the federal recusal statute, 28 U.S.C. § 455.

[26] *Caperton*, 556 U.S. at 876 (quoting FTC v. Cement Inst., 333 U.S. 683, 702 (1948)).

[27] *Id.* (quoting *Tumey*, 273 U.S. at 523).

[28] *Id.* at 887 ("Our decision today addresses an extraordinary situation where the Constitution requires recusal. . . . The facts now before us are extreme by any measure.").

[29] 28 U.S.C. § 455(a). The reasonable appearance standard was added to the statute in 1974 and represented a significant departure from traditional Anglo-American recusal law. In fact, prior to the addition of the "reasonable appearance" standard to § 455 in 1974, America recusal law had generally operated consistent with Blackstone's maxim that "the law will not suppose a possibility of bias or favour in a judge." 3 BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 361.

[30] FLAMM, *supra* note 2, at § 1.4 at 9 ("[B]ecause of the importance of assuring both litigants and the public at large that judges are impartial . . . virtually every commentator who has critically analyzed the subject of judicial disqualification has applauded its expansion.").

decided by individuals who are not only impartial in fact, but who appear so to the people affected by, and expected to comply with, their decisions.[31]

Unlike the Due Process Clause, which applies to all government adjudicators, the federal recusal statute applies to "[a]ny justice, judge, or magistrate judge of the United States." It does not apply to administrative adjudicators. Federal courts have interpreted the reasonable appearance standard as too broad for adjudicators who are employed by the very agencies that could appear before them.[32] For that reason alone, § 455 cannot be understood to govern administrative recusal. It does, however, represent a potentially useful example of why agencies may desire to take public perception into account when seeking to protect the integrity of their adjudications.

C. Model Codes of Conduct

Model codes of conduct are a valuable source of insight into the legal profession's views on recusal. The American Bar Association's (ABA's) National Conference of Administrative Law Judges (NCALJ) adopted its own set of ethical guidelines for ALJs in 1989, which included recusal standards. The *Model Code of Judicial Conduct for Federal Administrative Law Judges* (Model ALJ Code) was patterned after the ABA's *Model Code of Judicial Conduct* (Model Judicial Code), especially with regard to recusal. Canon 3(C) of the Model ALJ Code adopted the objective test from the Model Judicial Code, which also is codified in the federal recusal statute, by requiring recusal whenever an ALJ's "impartiality might reasonably be questioned."[33]

But the Model ALJ Code is only suggestive. It is not legally binding on ALJs by its own terms and has not been codified by Congress.[34] It has also not shown the staying power of the Model Judicial Code. The Model Judicial Code has been updated several times since 1989, while the Model ALJ Code has not. In 2007, the Model Judicial Code was expanded to explicitly

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[31] LOUIS J. VIRELLI III, DISQUALIFYING THE HIGH COURT: SUPREME COURT RECUSAL AND THE CONSTITUTION xii (2016) ("By guarding against the mere appearance of impropriety, recusal advances public confidence in the integrity and legitimacy of an otherwise unaccountable judiciary.").
[32] *See* Greenberg v. Board of Governors of the Federal Reserve, 968 F.2d 164, 167 (2d Cir. 1992).
[33] 28 U.S.C. § 455(a); AMERICAN BAR ASSOCIATION, MODEL CODE OF JUDICIAL CONDUCT FOR FEDERAL ADMINISTRATIVE LAW JUDGES Canon 3(C) (1989) ("Model ALJ Code"), http://digitalcommons.pepperdine.edu/cgi/viewcontent.cgi?article=1521&context=naalj.
[34] *See* Model ALJ Code, *supra*, at 132 ("Adaption and endorsement of the Model Code for Administrative Law Judge[s] by NCALJ does not make that Code applicable to any administrative law judge . . . ."); Steven A. Glazer, *Toward a Model Code of Judicial Conduct for Federal Administrative Law Judges*, 64 ADMIN. L. REV. 337 (2012).

include ALJs,[35] but only to the extent that individual jurisdictions deemed it desirable.[36] At least some jurisdictions have resisted. The Ninth Circuit, for example, has held that the Model Judicial Code did not apply to ALJs from the Social Security Administration (SSA), the agency that employs by far the largest number of ALJs, because the SSA itself had not adopted the Code and none of the ABA Model Codes "create[] legally enforceable duties."[37] In 2018, the NCALJ adopted the *Model Code of Judicial Conduct for State Administrative Law Judges* (Model State Code). Although the Model State Code does not purport to apply to federal adjudicators, it advocates for the same recusal standards as the other codes, including for recusal where a state ALJ's "impartiality might reasonably be questioned."[38]

ACUS recently published revised Model Adjudication Rules ("ACUS Model Rules").[39] The ACUS Model Rules require that an agency adjudicator "conduct her/his functions in an impartial manner."[40] They also require recusal on the grounds of "personal bias" or "basis for other disqualification."[41] Like the model codes described above, however, the ACUS Model Rules are only suggestive; they recommend that agencies adopt them, but provide no other legal obligations or remedies on their own.[42] They are also likely narrower than the Model ALJ Code. The "basis for other disqualification" standard could include the reasonable appearance standard, but is less explicit than the model codes on that point.

The model codes and rules support requiring recusal in many more cases than due process requires. This is important because it supports the conclusion that agency adjudicators are concerned about more than the negative effect of a partial adjudicator on the parties to that hearing. The fact that all three model codes require recusal where an adjudicator's impartiality might reasonably be questioned, *i.e.* regardless of whether actual bias or even a probability of actual bias would exist in the mind of a reasonable judge, confirms that the public's perception of the integrity of the proceeding is important to agency adjudicators and other members of the

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[35] AMERICAN BAR ASSOCIATION, MODEL CODE OF JUDICIAL CONDUCT I(B) (2007) ("A judge, within the meaning of this Code, is anyone who is authorized to perform judicial functions, including . . . [a] member of the administrative law judiciary."), http://www.americanbar.org/content/dam/aba/migrated/judicialethics/ABA_MCJC_approved.authcheckdam.pdf.

[36] *See id.* at n.1 ("Each jurisdiction should consider the characteristics of particular positions within the administrative law judiciary in adopting, adapting, applying, and enforcing the Code for the administrative law judiciary.").

[37] Lowry v. Barnhart, 329 F.3d 1019, 1024 (9th Cir. 2003).

[38] AMERICAN BAR ASSOCIATION, MODEL CODE OF JUDICIAL CONDUCT FOR STATE ADMINISTRATIVE LAW JUDGES Canon 2, Rule 2.11(A) (2018), https://www.americanbar.org/content/dam/aba/administrative/administrative_law_judiciary/2018-model-code-statealj.authcheckdam.pdf.

[39] ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, MODEL ADJUDICATION RULES 8 (Rule 112) (rev. 2018).

[40] *Id.* at 8 (Rule 112(A)).

[41] *Id.* at 8 (Rule 112(B)(2)(a)).

[42] *See id.* at vi (Preface) ("[T]he Working Group encourages agencies to adopt the revised [Model Adjudication Rules] in toto . . . .")

profession. This is further corroborated by specific canons in each model code explicitly requiring judges to promote public confidence in their conduct.[43]

There are, however, some obvious limitations to relying solely on the codes and rules as a template for adopting agency-specific recusal standards. The codes are only applicable to ALJs, as opposed to adjudicators presiding over Type B adjudications or appellate-style review hearings, and neither the model codes nor the ACUS Model Rules are directly enforceable as a matter of law. Moreover, despite the invitation to adopt the Model Judicial Code and the ACUS Model Rules, most agencies have declined to do so. This indicates that, although the benefits of broader recusal standards are real, a generalized, one-size-fits-all approach to administrative recusal is not the optimal approach to addressing recusal concerns in agency evidentiary hearings.

D. Government Ethics Provisions

Recusal is largely (although not exclusively) an ethical issue, and agency adjudicators are executive branch employees.[44] As a result, the statutes administered, and the regulations promulgated, by the Office of Government Ethics (OGE) governing executive branch employees' ethical conduct are an important source for agency recusal standards.

1. Ethics Statutes

The primary criminal statute relating to the recusal of agency adjudicators is 18 U.S.C. § 208,[45] which has been described by OGE as "the cornerstone of the executive branch ethics program. It prohibits an employee from participating personally and substantially in any particular matter in which he has a financial interest, or in which certain others with whom he is

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[43] See, e.g., AMERICAN BAR ASSOCIATION, MODEL CODE OF JUDICIAL CONDUCT FOR STATE ADMINISTRATIVE LAW JUDGES Canon 1, Rule 1.2 (2018), https://www.americanbar.org/content/dam/aba/administrative/administrative_law_judiciary/2018-model-code-statealj.authcheckdam.pdf; AMERICAN BAR ASSOCIATION, MODEL CODE OF JUDICIAL CONDUCT Canon 1, Rule 1.2 (2007), http://www.americanbar.org/content/dam/aba/migrated/judicialethics/ABA_MCJC_approved.authcheckdam.pdf; AMERICAN BAR ASSOCIATION, MODEL CODE OF JUDICIAL CONDUCT FOR FEDERAL ADMINISTRATIVE LAW JUDGES Canon 2.A (1989), http://digitalcommons.pepperdine.edu/cgi/viewcontent.cgi?article=1521&context=naalj.

[44] Recusal's role in promoting public confidence in the integrity of agency adjudication is more of an institutional, rather than an ethical, benefit.

[45] Sections 203 and 205 of Title 18 also outline conflicts of interest that could lead to disqualification or recusal, but the subject matter of those sections—prohibiting "Federal employees from representing private interests before the Government"—are less likely to affect adjudicators, who are generally in a deciding, rather than a representational role, in agency adjudications. OFFICE OF GOVERNMENT ETHICS, REPORT TO THE PRESIDENT AND TO CONGRESSIONAL COMMITTEES ON THE CONFLICT OF INTEREST LAWS RELATING TO EXECUTIVE BRANCH EMPLOYMENT 2 (2006) (OGE Report), https://www.oge.gov/web/oge nsf/Legal%20Interpretation/2992B018CA57C5B985257E96006A91E8/$FILE/Report%20to%20the%20President%20and%20Congress%20on%20Ethics.pdf.

associated [spouse, minor child, general partner, etc.] have a financial interest."[46] OGE has made clear that § 208 requires disqualification from "any 'judicial or other proceeding' . . . even if that financial interest is insubstantial."[47] Although it also contains some limiting provisions, the relevant feature of the statute is that it requires disqualification of agency adjudicators in a relatively narrow, and well-covered, set of circumstances—a direct financial interest in the adjudication by the adjudicator or a small group of people close to the adjudicator.[48]

2. Ethics Regulations

OGE has also issued specific ethics regulations that apply to executive branch employees, including but not limited to agency adjudicators. The OGE regulation that most directly applies to recusal of administrative adjudicators can be found at 5 C.F.R. § 2635.502 ("section 502" or "§ 502"). Section 502(a) states that an employee "should not participate" in a matter where the employee knows *either* that they have a direct financial interest in the matter *or* that a person with whom the employee "has a covered relationship is or represents a party" *and* the "circumstances would cause a reasonable person . . . to question his impartiality in the matter."

Section 502(a)'s standard is not designed specifically for adjudicators presiding over evidentiary hearings, and as such does not take into account the full range of issues that can arise in that quasi-judicial setting. The objective nature of the test in § 502(a) is analogous to the broad appearance standard in the federal recusal statute and the model codes mentioned above, but it is substantively limited to only appearances resulting from financial interests and covered relationships.[49] Section 502(a) is further limited by its suggestive ("should not participate"), rather than mandatory, language.

Finally, § 502(a)(2) allows for an employee to seek advice on whether he should participate in a given matter if "circumstances other than those specifically described in this section would raise a question regarding his impartiality." This language could certainly be used to trigger recusals in a wider range of cases than the other language in § 502(a), but it could only do so at the behest of the recused employee, and even then is only suggestive. The purely voluntary nature of § 502(a)(2) makes it an inadequate substitute for mandatory, agency-specific recusal standards because relying on an employee's judgment to trigger his own recusal does not instill the same measure of public confidence in the integrity of the proceeding.

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[46] *Id.* at 28.
[47] *Id.* at 29.
[48] The statute requires that the employee have knowledge of the disqualifying financial interest. It also permits employees to seek waivers from the official who appointed them, and allows OGE to promulgate regulatory exemptions for classes of financial interest deemed too remote or inconsequential to merit disqualification. *Id.* (discussing 18 U.S.C. §208(a), (b)).
[49] The scope of covered relationships that could trigger disqualification is limited largely to financial/employment and familial relationships. 5 C.F.R. § 2630.502(b)(1)(i)-(v).

In addition to § 502, OGE can work with agencies to promulgate any supplementary regulations that the agency deems are "necessary and appropriate . . . to fulfill the purposes" of the existing OGE regulations.[50] Supplemental regulations could be a useful vehicle for adopting agency-specific recusal standards, but an ACUS review of the current list of supplemental regulations did not reveal any supplemental regulations pertaining specifically to agency adjudicators, let alone to administrative recusal.[51]

3. General Principles

OGE has also promulgated a list of "14 General Principles" that, it explains, "apply to every employee and may form the basis for the standards contained in this part."[52] It goes on to explain that where a situation is not covered by a specific ethical standard, "employees shall apply the principles . . . in determining whether their conduct is proper."[53]

Principle 14 refers to employees creating an appearance of impropriety, and on that basis could be seen as supporting a broader approach to agency recusal than that articulated in § 502. The text of Principle 14, however, stops short of opening the door to a wide-ranging appearance standard by being both aspirational and tethered to existing law. It states that "employees shall *endeavor* to avoid . . . creating the appearance that they are violating the law or ethical standards *set forth in this part*."[54] Although the principle's focus on appearances may be a bit broader than § 502, it is tethered too closely to the substantive provision of that section to meaningfully expand recusal requirements for agency adjudicators.

E. Administrative Recusal Statutes and Regulations

Unlike the federal recusal statute and OGE regulations, there are statutory and regulatory standards that are specifically directed at agency adjudicators.

1. The APA

Section 556(b) of the Administrative Procedure Act (APA) requires that evidentiary hearings under the APA (what is traditionally referred to as "formal adjudication") "shall be conducted in an impartial manner." The Asimow Study identifies the various forms of bias that § 556(b) is designed to prevent—financial interests, personal animus, and prejudgment of

[50] *See* 5 C.F.R. § 2635.05.
[51] For a more detailed discussion of the reasons for and against using OGE regulations to address agency-specific recusal questions, see Part V, *infra*.
[52] OFFICE OF GOVERNMENT ETHICS, 14 GENERAL PRINCIPLES, https://www.oge.gov/web/oge nsf/0/73636c89fb0928db8525804b005605a5/$file/14%20general%20priniciples.pdf.
[53] *Id.*
[54] *Id.* at Principle 14 (emphasis added).

adjudicative facts—and makes a persuasive case for why agencies should consider promulgating recusal regulations to prevent these types of bias from affecting their adjudications.[55] ACUS recommendation 2016-4 adopts the Asimow Study's suggestion that the three types of bias targeted by § 556(b) should be prohibited in agency-specific procedural regulations.[56]

There are two reasons why § 556(b)'s bias standard does not occupy the entire field of administrative recusal. First, it by definition only applies to adjudicators governed by §§ 556 and 557 of the APA, which represent only one portion of the adjudicators included in this study.[57] Second, it does not address appearances of bias or partiality that could affect public perception, even if those appearances do not in fact skew the outcome of the adjudication. While the reasonable appearance standard may not be as readily applied to agency adjudication as to federal courts, some consideration of the impact of adjudicators' conduct on public confidence in administrative adjudication may be not only appropriate, but also beneficial.

2. Agency-Specific Regulations

Notwithstanding the effects of due process, the federal recusal statute, model codes, various ethics provisions, and the APA, some agencies have still taken it upon themselves to establish their own recusal standards. The very existence of such standards makes two important points. First, at least some agencies believe that their adjudicators' recusal practices are not definitively governed by external sources of law or policy, *i.e.* there is a gap in administrative recusal law that needed filling. Second, the choice by some agencies to include the reasonable appearance standard in their recusal regulations shows that public confidence in the integrity of their adjudications is important to the agency and worth protecting through recusal.

In terms of the specific recusal standards adopted by individual agencies, the available evidence at this point is largely anecdotal. The Merit Systems Protection Board has promulgated a regulation requiring recusal "on the basis of personal bias or other disqualification,"[58] but has also referred to the federal recusal statute's reasonable appearance standard when reviewing an adjudicator's denial of a party's motion to recuse.[59] Other agencies have limited recusal standards to situations involving an adjudicator's financial interest or personal relationship with a party;[60] findings of actual or apparent adjudicator bias;[61] generic determinations like an

[55] *See* Asimow Study, *supra* note 5, at 23.
[56] *See* Recommendation 2016-4, adopted Dec. 13, 2016, https://www.acus.gov/sites/default/files/documents/informal-agency-adjudication-recommendation-final.pdf.
[57] It is true that recommendation 2016-4 states that those same bias standards should be applied to non-ALJ adjudication, but this does not amount to a statutory standard for purposes of outlining the existing landscape of administrative recusal.
[58] 5 C.F.R. § 1201.42(a).
[59] *See* Shoaf v. Department of Agriculture, 97 M.S.P.R. 68, 73 (2004).
[60] *See* 40 C.F.R. § 164.40(a) (EPA); 7 C.F.R. 47.11 (Agriculture).
[61] *See* Asimow Study, *supra* note 5, at 53 (citing 29 C.F.R. § 1610(h) and EEOC Handbook for Administrative Judges, Ch. 7H).

adjudicator "should be disqualified";[62] and violations of the "Code of Judicial Conduct," which includes the reasonable appearance standard.[63]

The Social Security Administration (SSA) has among the most developed set of recusal standards. It has adopted different standards for different adjudicators, some of which are regulatory and some of which are contained in sub-regulatory guidance documents. The SSA's recusal practices for ALJs are governed by regulation. Recusal is required when an ALJ "is prejudiced or partial with respect to any party or has any interest in the matter pending for decision."[64] Its Program Operations Manual System (POMS) contains agency guidance requiring recusal of Disability Hearing Officers (DHOs). The POMS requires DHOs to recuse when they have sufficient familiarity with the participants in the proceedings that a reasonable observer "would perceive a substantial likelihood that the DHO cannot make an impartial decision."[65] According to the agency, it is currently developing guidance on recusal of appellate-level officers that will be at least procedurally different from its other recusal standards.

This snapshot of existing agency regulations represents only a small portion of the agencies that employ the category of adjudicators targeted by this study. Based on the Asimow Study and Barnett et al. Study, both of which investigated a subset of the adjudicators included here, it is clear that many of the agency adjudicators considered for this report either do not require recusal at all or do not rely on regulatory standards to do so.[66] There is still more work to do to accurately map the landscape of agency recusal regulations,[67] but suffice to say that neither the existence of recusal regulations, nor their content, demonstrate consistency of thought or approach to the issue across different agencies.

Despite at least some agencies' apparent interest in treating recusal independently from other ethics provisions, and even in employing the reasonable appearance standard, their approach is far from uniform and demonstrates that additional guidance regarding agency-specific recusal standards could prove useful.

The remaining portions of the report are dedicated to exploring the potential benefits of specific recusal rules, the procedures by which those rules should be adopted and enforced, and

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[62] 10 C.F.R. § 2.313 (Nuclear Regulatory Commission).
[63] *See* 43 C.F.R. § 4.1122 (Interior); ABA MODEL CODE OF JUDICIAL CONDUCT, Canon 2, Rule 2.11 (2011), https://www.americanbar.org/groups/professional_responsibility/publications/model_code_of_judicial_conduct/model_code_of_judicial_conduct_canon_2/rule2_11disqualification.html.
[64] 20 CFR §§ 404.940, 416.1440.
[65] SOCIAL SECURITY ADMINISTRATION, PROGRAM OPERATIONS MANUAL SYSTEM (POMS) DI 33015.045A.
[66] *See, e.g.*, Barnett et al. Study, *supra* note 6, at 49 (finding that less than half of the non-ALJ types identified in that study were subject to recusal regulations, according to their agencies, and that more than a third of the non-ALJs that were required to recuse based their recusal decisions on agency custom.)
[67] The ongoing study seeks, among other things, to catalog the existing landscape of adjudicative recusal standards for use in a follow-up report regarding best practices in developing agency-specific recusal standards.

some of the structural features that could affect an individual agency's choices about its own approach to recusal.

IV. THE VALUE OF AGENCY-SPECIFIC RECUSAL STANDARDS

The legal provisions and agency practice regarding recusal indicate that well-developed, agency-specific recusal rules could benefit agency adjudication, both by protecting litigants from biased decision makers and by advancing public confidence in the integrity of the adjudicative process. Those rules should be published in the Federal Register and Code of Federal Regulations to provide notice to the parties and the general public that the agency is concerned with proceedings that are fair and impartial and that appear so to the reasonable observer.[68] Publication also makes it easier for parties to enforce the recusal standards,[69] which further serves the goals of protecting the parties and promoting public confidence in the proceedings.

A. Dealing with Actual or Probable Bias

A combination of due process protections, APA impartiality requirements, and OGE ethical protections are relatively effective at checking actual adjudicator bias and, in many cases, at preventing a reasonable probability of such bias. As the Asimow Study suggested, agencies should continue to be vigilant, however, in promulgating rules to protect parties from biased adjudicators.[70] The Supreme Court has made clear that "most matters relating to judicial disqualification [do] not rise to a constitutional level,"[71] and the APA's impartiality requirement does not apply to the multitude of adjudicators who fall outside the statute. Moreover, although OGE's ethical rules apply to non-ALJ adjudicators, they focus primarily on financial and relational conflicts of interest; they do not directly address issues such as personal animus or prejudgment. Agency-specific recusal rules could be helpful in ensuring that all of the forms of bias targeted by both the APA and OGE are addressed for non-APA adjudicators.[72]

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[68] ACUS has an ongoing project on the Public Availability of Adjudication Rules, see https://www.acus.gov/research-projects/public-availability-adjudication-rules, and has published a memorandum describing the project. *See* Memorandum from Todd Phillips, Attorney Advisor, Administrative Conference of the United States, to Ad Hoc Committee of the Committee on Administration and Management and the Committee on Adjudication, at 4-5 (Sept. 28, 2018) (discussing publication of adjudication rules), https://www.acus.gov/sites/default/files/documents/Memorandum%20-%20Public%20Availability%20of%20Adjudication%20Rules.pdf.

[69] *See infra* Part V. for a discussion of private causes of action under agency-specific recusal regulations.

[70] *See* Asimow Study, *supra* note 5, at 23.

[71] *Caperton*, 556 U.S. at 876 (quoting FTC v. Cement Inst., 333 U.S. 683, 702 (1948)).

[72] OGE's rules also do not provide for a private cause of action; enforcement is dependent on an agency's ethics official being notified of the potential problem and taking action. This is notably different from traditional recusal enforcement—and ostensibly from enforcement of agency-specific recusal regulations—and thus should be taken into account by agencies when formulating their own policies. The reason for favoring a private cause of action in recusal is developed in more detail in Part V., *infra*.

B. The Appearance of Impartiality

Agency-specific recusal regulations stand to benefit agency adjudication most clearly through their role in promoting public confidence in the integrity of adjudicative proceedings. There is good reason to believe that agencies already take the appearance of impartiality very seriously when conducting adjudications, and there is likewise good reason to believe that agency adjudication is being conducted in a fair and impartial manner. Appearances to the contrary could jeopardize the agency's reputation and effectiveness by conveying inaccurate negative information about the adjudication.

Current legal restrictions on agency adjudication do not require that appearances be taken into account when deciding recusal questions. Due process is focused on the probability of actual bias in a reasonable judge. The federal recusal statute and model codes offer a broad reasonable appearance standard, but the statute does not apply to administrative adjudicators and the codes are not self-enforcing and have not been adopted by most agencies. Even when they do mention appearances, government ethics provisions are narrowly tailored to financial and relational conflicts, and the APA is limited to ALJ bias.

There is thus a gap in the recusal safety net when it comes to public perception of agency adjudication. Agencies have good reasons to try to fill that gap with agency-specific regulations designed to minimize situations in which an adjudicator's impartiality might reasonably be questioned. First, agencies are already concerned about how their adjudications are perceived, and often take internal, unpublicized measures to project the appearance of impartiality. Recusal regulations would be more permanent and enforceable expressions of that concern. Second, and related, is the idea that transparency and clarity amplify and broaden the message. In an increasingly polarized political environment, public statements like regulations in support of impartiality—and the appearance thereof—can be a powerful countervailing force to increasing cynicism about, and suspicion of, our public institutions. Third, promulgating recusal regulations can help preempt concerns about integrity before they arise. Finally, a broader, appearance-focused approach to recusal would be consistent with the prevailing view of the legal profession that its recusal canons should apply to agency adjudicators, including ALJs.

1. Additional Factors to Consider

While there is value to agencies promulgating recusal regulations that seek to promote public confidence in their adjudicative systems, each agency will need to consider carefully how to do so without unduly compromising agency effectiveness. It is likely unreasonable, for example, to apply wholesale the federal recusal statute's reasonable appearance standard to agencies. Unlike federal judges, agency adjudicators by definition have a relationship with a party (the agency) that frequently appears before them. They also have—particularly in the context of agency appellate bodies and agency heads—a policymaking function that requires

adjudicators to make value judgments that a federal judge would not be asked to make.[73] Each agency should thus evaluate its own adjudicative system and design a regulation that balances the importance of reassuring the public about the integrity of its proceedings against the need for effective and efficient adjudication.

Toward that end, the following variables are useful guideposts for agencies designing recusal standards aimed at preserving their appearance of impartiality:

- The degree of adjudicator independence. ALJs are often more carefully insulated from agency influence than other adjudicators; does the presence of a non-ALJ signal to the public a greater likelihood of partiality or bias? If so, that may help inform the agency as to how strictly to regulate appearances.

- The regularity of the agency appearing as a party. Agencies cannot adopt reasonable appearance standards that require recusal solely due to the agency appearing as a party in the adjudication, but agencies who regularly appear in evidentiary hearings before their own adjudicators should balance that fact against the interest in promoting a reasonable appearance of impartiality.

- Nature of the adjudicative body or proceeding. Is the evidentiary hearing part of an enforcement proceeding? Enforcement proceedings are inherently problematic from an appearance standpoint because the agency has a clear interest in the outcome and is appearing before one of its employees. On the other hand, a broad appearance standard could prevent basically *any* agency adjudicator to preside over an enforcement proceeding, making it difficult to pursue enforcement at all. Agencies with a high percentage of enforcement hearings may thus be forced to balance the reasonable appearance issue differently than other agencies.

- The agency's adjudicative caseload and capacity. Agencies with large caseloads and adjudicative staffs may find it easier to impose stricter recusal standards—like a version of the reasonable appearance standard—due to the relative ease of replacing a recused adjudicator. Smaller agencies or those with fewer adjudicators run the risk of strict recusal standards hindering the agency's ability to issue decisions due to a lack of available adjudicators in a given case.

[73] *See, e.g.*, Phyllis E. Bernard, *The Administrative Law Judge As A Bridge Between Law And Culture*, 23 J. NAT'L ASS'N ADMIN. L. JUDGES 1, 13 ("Despite intermittent expressions of caution--even of doubt and denial--we still turn to ALJs to identify and articulate the nuances of agency policy.").

- The agency's public profile. Agencies who administer controversial or widely popular programs may face greater public scrutiny over their activities and, in turn, find greater cause for recusal based on public perception than less visible agencies.

- The adjudicator is part of a multi-member body. Recusal of a single adjudicator presents problems if replacements are not readily available, but recusal of one of several members of an adjudicative body raises concerns about the resulting makeup of the body. Recusal could lead to tie votes or different outcomes based on the composition of the remaining members, such that public perception of the adjudication could suffer as much or more because of a decision to recuse as it would if the member who created the appearance of partiality participated in the decision. Agencies should be aware of that potential consequence when setting recusal standards designed to protect their appearance of impartiality.

- The adjudication is an appellate proceeding or an initial determination. Appellate proceedings may raise different public perception concerns for several reasons. First, they are likely to be of greater public interest as the proceeding rises through the agency decision making hierarchy. Second, and by contrast, an appellate tribunal may be limited in terms of its standard of review or the factual record presented to it, such that public expectations are different than they would be of an initial decision maker. Finally, where the appellate reviewer is also the agency head, appearances may be of greater concern due to the heightened scrutiny and responsibility of agency leaders.

V. RECUSAL PROCEDURES

Agency-specific recusal statutes should also contain procedural requirements that meet the agency's particular needs and advance its goals of preventing bias and promoting public confidence in its adjudications.

As mentioned above, agency-specific recusal regulations should be published in the Code of Federal Regulations and the Federal Register. This will increase public awareness of the prevailing standards and, with regard to public perception, help develop public confidence in an agency's integrity before the public has any reason to question it.

Agency recusal standards should include a private cause of action for parties to the adjudication. The Asimow Study argued that peremptory challenges to adjudicators (requiring recusal without any substantive demonstration of bias or some other disqualifying feature) "could be difficult and costly for agencies to implement" and therefore should not be part of adjudicatory best practices.[74] I agree.

[74] Asimow Study, *supra* note 5, at 23.

A party's motion to recuse is different from a peremptory challenge in that it would still require a showing that the adjudicator had met the regulatory standard for recusal. It is also different from current procedures under federal ethics regulations because it does not require a third-party ethics official to initiate the recusal proceeding. A private cause of action under a recusal regulation would not preclude the agency from pursuing an ethics complaint (and thus maintaining control over the conduct of its employees), but would allow a party who is concerned about the adjudicator's fitness to file a motion to recuse in the proceeding. Since the parties and the adjudicator are most likely to be familiar with the details of their own adjudications, allowing a private cause of action for recusal streamlines the process and puts parties in more immediate control of their fate in instances where they are concerned about the integrity of the proceeding.

Recusal motions (unlike ethics complaints) should be heard in the first instance by the adjudicator who is being asked to recuse. This would bring administrative recusal procedurally in line with judicial recusal, which requires presiding judges initially to decide their own recusal issues. The benefit of such an approach is that the judge or adjudicator in question is very often in the best position to know the facts of the situation and to be able to remedy them by removing him or herself from the case. Having adjudicators decide their own recusal motions also creates a sense of checks and balances between parties and the bench—it discourages parties from filing frivolous or strategic recusal motions, and pressures adjudicators to demonstrate their own commitment to the integrity of the proceedings by resolving the issue thoroughly and impartially.

Recusal decisions should be subject to appeal within the agency and then to judicial review. Parties should have a right to appeal an initial decision not to recuse. The possibility of appeal generally will require the adjudicator facing recusal to build a record in support of his/her decision. The presence of a record promotes transparency and accountability, and provides a check against self-serving recusal decisions by the presiding adjudicator. Appeal within the agency is faster and more efficient than judicial review, and can be more searching as well, if agencies chose to permit the same *de novo* review of factual and legal conclusions in recusal decisions as the APA does for an ALJ's initial decision.[75]

Agencies must determine if there should be an intermediate appellate forum for recusal decisions or if they should be appealed directly to agency heads. Due to the potentially large number of recusal issues in some agencies, requiring agency heads to review each recusal issue arising anywhere within the agency's adjudicative system would be too burdensome. Appeal to an intermediate body is preferable, with a possibility of discretionary review of the intermediate appellate body by agency heads. If the initial adjudicator is only reviewable by the head of an

[75] 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision.").

agency, an intermediate review body could be formed from among the adjudicator's peers (a panel of fellow ALJs for an ALJ recusal issue, for example). For recusal issues arising for one member of a multi-member adjudicative body, initial review of the adjudicator's decision should be performed by the remaining members of the body, especially if the multi-member body either is the agency itself or is directly responsible to the agency head.

Agencies should seek to include the agency official responsible for assigning adjudicators in any intermediate appellate review of recusal matters. This would allow agencies to retain the right to assign adjudicators to individual cases and would ensure that the reviewing authority would understand the institutional consequences of recusal and reassignment in a given proceeding.

Agencies will also be faced with a determination as to whether recusal issues will be appealable on an interlocutory basis. The issues raised in the recusal context are the same for any interlocutory review issue—the cost of delaying the adjudication on the merits in order to resolve a recusal question versus the benefit of avoiding redundant proceedings where recusal is found to be necessary after the initial adjudication is completed. Agencies with large adjudicatory dockets may be less inclined to permit interlocutory review for fear of overwhelming appellate reviewers and delaying large numbers of active adjudications. Agencies with smaller dockets will likely have fewer recusal issues to review and therefore whether they are available on an interlocutory basis may have less of an overall impact on agency effectiveness.

Judicial review is important as a check against the appearance of self-serving behavior on the part of the agency. For reasons of efficiency and expertise, some measure of judicial deference to agency decisions would be advisable. If agencies promulgate specific recusal regulations, then absent an explicit prescription in the regulation itself requiring a different standard of review, judges would apply *Auer* deference to agency recusal decisions.[76] If agencies provide for internal agency appeals of recusal decisions, then judicial deference to those appellate decisions promotes a proper balance of efficiency and respect for agency expertise with judges' power to correct errors. If an agency does not provide for internal appeal of an adjudicator's recusal determination, then agencies should consider permitting reviewing judges to consider those decisions *de novo*.

VI. RECOMMENDED BEST PRACTICES

Recusal of agency adjudicators that preside over legally required evidentiary hearings serves two important purposes. It protects litigants from biased decision makers and it promotes

[76] *See* Auer v. Robbins, 519 U.S. 452, 461 (1992) (finding the Secretary of Labor's interpretation of his own regulation "controlling unless 'plainly erroneous or inconsistent with the regulation'").

public confidence in the administrative process by demonstrating to outside observers that the agency values impartiality.

The current legal framework around recusal of agency adjudicators is a collection of sources—only some of which are legally binding—that either do not fully address both of recusal's goals or do so only for a subset of agency adjudicators.

Agencies should fill the gap in the existing framework by promulgating agency-specific recusal regulations. Those regulations should be tailored to best accommodate the specific features of the agency's adjudicative proceedings and its institutional needs, particularly as they pertain to both promoting the actual and perceived integrity of agency adjudications and maximizing the effectiveness and efficiency of those proceedings.

Common features of agency-specific recusal regulations should include:

1. A provision requiring recusal in instances of bias, as defined in paragraph 5 of ACUS Recommendation 2016-4 and the Asimow Study;

2. A provision requiring recusal in at least some instances where the adjudicator's impartiality might reasonably be questioned; and

3. Provisions outlining the procedures by which recusal issues will be resolved, including a private cause of action for litigants seeking recusal, initial determination by the presiding adjudicator, intra-agency appeal, and judicial review.

Recusal Rules for Administrative Adjudicators

Committee on Adjudication

Proposed Recommendation for Committee | October 10, 2018

[PREAMBLE WILL BE INSERTED HERE]

RECOMMENDATION

1. Agencies should adopt rules for adjudicator recusal, separate and apart from the ethical conflict of interest rules that govern all agency employees. In so doing, they should consider both actual and perceived integrity of agency adjudications and seek to maximize the effectiveness and efficiency of their adjudicative proceedings.
2. Regulations promulgated in accordance with Recommendation 1, should be tailored to accommodate the specific features of an agency's adjudicative proceedings and its institutional needs, including but not limited to consideration of the following factors:
    a. The degree of the adjudicator's independence from his or her agency;
    b. The regularity of the agency's appearance as a party in proceedings before the adjudicator;
    c. The nature of the adjudicative body or proceeding, including whether or not the hearing is part of enforcement proceedings;
    d. The agency's adjudicative caseload volume and capacity, including the number of other adjudicators available to replace a recused adjudicator;
    e. The level of public scrutiny that rests upon the agency's activities; and
    f. Whether a single adjudicator renders a decision in proceedings, or whether multiple adjudicators render a decision as a whole.

3. The recusal rules adopted in accordance with Recommendation 2 should include the following features:
    a. A provision requiring recusal in instances of bias, as defined in paragraph 5 of ACUS Recommendation 2016-4;
    b. A provision requiring recusal in at least some instances where the adjudicator's impartiality might be reasonably questioned; and
    c. Provisions outlining the procedures by which recusal issues will be resolved, including a private cause of action for litigants seeking recusal, initial determination by the presiding adjudicator, intra-agency appeal, and judicial review.

From:	Gavin Young
To:	Committee on Adjudication (Gov)
Subject:	ACUS Committee on Adjudication: Recusal Rules Oct. 24 Meeting - Reminder, Remote Attendance, and Agenda
Date:	Friday, October 19, 2018 3:44:14 PM
Attachments:	image001.png Committee on Adjudication Meeting Agenda - October 24 Recusal Rules.pdf

Dear Members of the Committee on Adjudication and Interested Persons:

Many thanks to those who participated in our first meeting to discuss Recusal Rules for Administrative Adjudicators. This is a reminder that the Committee's second meeting is this upcoming **Wednesday, October 24, from 1:00 pm to 4:00 pm ET**. For those who have yet to respond, you may RSVP by replying to info@acus.gov and indicating whether you will attend, and whether your attendance is in person or via teleconference.

For those attending in person, the meeting will be held at ACUS, at **1120 20th Street NW, Suite 706 South**. When you arrive at Lafayette Centre, please enter the south building and take an elevator to the seventh floor. The meeting will take place in the conference room next to the elevators. For those attending remotely, remote attendance information is at the bottom of this email.

Attached, please find the agenda for the meeting, which will also be posted on the project page shortly. A revision of the draft recommendation will also be distributed prior to the meeting.

For those participating remotely, please follow the instructions below, and note that the system requires you to log in to the "GoToMeeting" program using either a computer or a smartphone:

Please join my meeting from your computer, tablet or smartphone.
https://global.gotomeeting.com/join/700438645
You can also dial in using your phone.
United States: **+1 (872) 240-3311**
Access Code: **700-438-645**
First GoToMeeting? Let's do a quick system check: https://link.gotomeeting.com/system-check

Please reply to me at gyoung@acus.gov if you have any questions, and thank you for your service to the Administrative Conference.

Sincerely,

Gavin Young | Counsel for Congressional Affairs
cid:image001.png@01D38973.B4086610
1120 20th Street, NW Suite 706 South . Washington, DC . 20036
(202) 480-2080 (tel.) . (202) 386-7190 (f)
gyoung@acus.gov . www.acus.gov

Committee on Adjudication
Public Meeting Agenda

October 24, 2018, 1:00 P.M. ET
1120 20th St NW, Suite 706 South, Washington, DC 20036
Remote Attendance at: https://global.gotomeeting.com/join/700438645 or
by phone at: +1 (872) 240-3311 / Access Code: 700-438-645

I. Meeting Opening—Nadine Mancini, Committee Chair

II. Presentation—Prof. Louis J. Virelli, III

III. Committee Consideration of Draft Recommendation

IV. Comments by Public Attendees (if Committee consents)

V. Closing Remarks—Nadine Mancini, Committee Chair

From: Gavin Young
To: Committee on Adjudication (Gov)
Subject: ACUS Committee on Adjudication: Recusal Rules Draft Recommendation for Oct. 24 Meeting
Date: Monday, October 22, 2018 7:53:14 PM
Attachments: image001.png
Recusal Rules for Administrative Adjudicators - Draft Recommendations for Committee - October 22.pdf

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Dear Members of the Committee on Adjudication and Interested Persons:

Attached, please find the draft recommendation for the Recusal Rules for Administrative Adjudicators project. It will be considered at the second committee meeting **this Wednesday, October 24**. The draft will also be posted on the project page shortly.

If you have yet to RSVP for the meeting, please do so by replying and indicating whether you will attend, and whether your attendance is in person or via teleconference. Meeting details including remote attendance information can be found in the prior email below.

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gyoung@acus.gov . www.acus.gov

From: Gavin Young
Sent: Friday, October 19, 2018 3:44 PM
To: Committee on Adjudication (Gov) <COA@acus.gov>
Subject: ACUS Committee on Adjudication: Recusal Rules Oct. 24 Meeting - Reminder, Remote Attendance, and Agenda

Dear Members of the Committee on Adjudication and Interested Persons:

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Recusal Rules for Administrative Adjudicators

Committee on Adjudication

Proposed Recommendation for Committee | October 24, 2018

[PREAMBLE WILL BE INSERTED HERE]

RECOMMENDATION

1. Agencies should adopt rules for recusal of adjudicators who preside over adjudications governed by the adjudication sections of the Administrative Procedure Act (APA) as well as those not governed by the APA but administered by federal agencies through evidentiary hearings required by statute, regulation, or executive orders. The recusal rules would also apply to adjudicators who conduct intra-agency appellate review of decisions from those hearings, though they would not apply to agency heads. In so doing, they should consider both actual and perceived integrity of agency adjudications and seek to maximize the effectiveness and efficiency of their adjudicative proceedings.
2. Agency rules should, consistent with ACUS Recommendation 2016-4, require recusal in cases of actual adjudicator partiality (referred to as bias in ACUS Recommendation 2016-4), such as:
    a. Improper financial or other personal interest in the decision;
    b. Personal animus against a party or group to which that party belongs; or
    c. Prejudgment of the adjudicative facts at issue in the proceeding.
3. Agency recusal rules should include provisions preserving the appearance of impartiality among its adjudicators. Such provisions should be tailored to accommodate the specific

features of an agency's adjudicative proceedings and its institutional needs, including consideration of the following factors:

a. The regularity of the agency's appearance as a party in proceedings before the adjudicator (the more frequently an adjudicator must decide issues in which his or her employing agency is a party, the more attentive the agency should be in assuring the public that its adjudicators are impartial);

b. Whether or not the hearing is part of enforcement proceedings (an agency's direct interest and investment in the outcome of enforcement proceedings could raise public skepticism about adjudicators' ability to remain impartial and thus require stronger recusal standards);

c. The agency's adjudicative caseload volume and capacity, including the number of other adjudicators available to replace a recused adjudicator (if recusal could realistically infringe upon an agency's ability to adjudicate by depriving it of necessary adjudicators, then more flexible recusal standards may be necessary);

d. The level of public scrutiny that rests upon the agency's activities (the closer the public's attention to an agency's activities, the more diligent it will have to be to maintain an appearance of impartiality);

e. Whether the adjudicative body presides over the initial determination of acts in a reviewing/appellate capacity (limitations on appellate standards of review could reduce the need for strict recusal standards, but the higher profile and greater authority of the appellate body could draw additional public attention such that stronger recusal standards are needed to protect against public cynicism); and

f. Whether a single adjudicator renders a decision in proceedings, or whether multiple adjudicators render a decision as a whole (concerns about quorum, the administrative complications of tied votes, and preserving the deliberative nature of multi-member bodies may counsel in favor of more flexible recusal standards).

4. Agency recusal rules should also include procedural provisions for agencies to follow in determining when recusal is appropriate. At a minimum, those provisions should include the right of petition for litigants seeking recusal, initial determination by the presiding adjudicator, and intra-agency appeal.

Commented [A1]: This parenthetical and those that follow have been inserted here for the purposes of discussion in the absence of a preamble and are not necessarily in their final location